02-1540

STATE OF WISCONSIN

IN SUPREME COURT

No. 02-1540-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JOSHUA O. KYLES,

Defendant-Respondent.

REVIEW OF DECISION OF COURT OF APPEALS THAT AFFIRMED ORDER SUPPRESSING EVIDENCE ENTERED IN CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE DAVID M. BASTIANELLI, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

PEGGY A. LAUTENSCHLAGER
Attorney General

STEPHEN W. KLEINMAIER
Assistant Attorney General
State Bar #1014422

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8908

TABLE OF CONTENTS

Page

CASES CITED

Page

Page

Page

Page

WISCONSIN STATUTES CITED

OTHER AUTHORITY

STATE OF WISCONSIN

IN SUPREME COURT

No. 02-1540-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JOSHUA O. KYLES,

Defendant-Respondent.

REVIEW OF DECISION OF COURT OF APPEALS THAT AFFIRMED ORDER SUPPRESSING EVIDENCE ENTERED IN CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE DAVID M. BASTIANELLI, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

ISSUES PRESENTED FOR REVIEW

1. Should the decision in *State v. Mohr*, 2000 WI App 111, 235 Wis. 2d 220, 613 N.W.2d 186,[1] be overruled because it is contrary to decisions of the United States Supreme Court and the Wisconsin Supreme Court.

[1]The *Mohr* decision is reproduced in the appendix of this brief (Pet-Ap. 121-30).

Neither the trial court nor the court of appeals considered the question because they are without authority to overrule *Mohr*.

2. For a frisk to be valid, must the police officer actually fear the suspect?

Trial court answered: The court indicated that actual fear was necessary for the frisk to be valid.

Court of appeals: The court did not consider the question.

3. Did the totality of the specific and articulable facts known to Kenosha Police Officer Michael Rivera, and the rational inferences from those facts, provide reasonable suspicion to a reasonably prudent person that Joshua O. Kyles may be armed so that Rivera's frisk of Kyles was justified?

Trial court answered: No.

Court of appeals answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The fact that this court granted the petition for review shows that the case merits oral argument and publication of the opinion.

STATEMENT OF THE CASE

On December 23, 2001, Joshua O. Kyles was the passenger in a car that was stopped by Kenosha Police Officer Chad Buchanan because the headlights were not activated (35:18-19). Events led Kenosha Police Officer Michael Rivera to patting down Kyles and finding marijuana in his pocket (35:7-9). Later, at the detective

bureau, another police search found more marijuana in Kyles' jacket (35:9).

On December 28, 2001, a complaint was issued charging Kyles with possession of tetrahydrocannabinol with intent to deliver as a drug repeater and as a felony repeater in violation of Wis. Stat. §§ 961.41(1m)(h)1., 961.48(1) and 939.62(1)(b) (1:1; Pet-Ap. 117).

Kyles was bound over for trial after he waived his preliminary hearing on January 4, 2002 (32:4-6). On that date, the information was filed charging Kyles with possession of tetrahydrocannabinol with intent to deliver as a drug repeater and as a felony repeater in violation of Wis. Stat. §§ 961.41(1m)(h)1., 961.48(1) and 939.62(1)(b) (9; Pet-Ap. 120).

On January 10, 2002, Kyles filed a motion to suppress the evidence seized from him on December 23, 2001, on the ground that it was seized in violation of his rights under the Fourth Amendment to the United States Constitution (14:1-2).

At the conclusion of the February 21, 2002, hearing on Kyles' suppression motion, the court granted the motion (35:24-31; Pet-Ap. 109-16).

On April 23, 2002, the court entered the order granting the suppression motion for the reasons the court stated at the February 21, 2002, hearing (28; Pet-Ap. 104).

On June 3, 2002, the state appealed from the order suppressing the evidence (30:1).

In a decision issued on March 27, 2003, the court of appeals affirmed the trial court order in *State v. Joshua O. Kyles*, No. 02-1540-CR (Wis. Ct. App. Dist. II March 27, 2003); Pet-Ap. 101-03.

This court on June 12, 2003, granted the state's petition for review of the decision of the court of appeals.

STATEMENT OF FACTS

A. Suppression hearing testimony.

At about 8:45 p.m. on December 23, 2001, Officer Buchanan stopped a vehicle in the 2900 block of 60th Street in Kenosha because the vehicle was operating without its headlights activated (35:18). Buchanan said it was completely dark (35:18-19). The driver was Charlie Nelson and the passenger was Kyles (35:19). Buchanan explained that, after Nelson consented to a search of the car, the individuals in the car were removed so the search could be performed (35:19-20). Officer Rivera assisted Buchanan (35:20).

After hearing on the radio that Buchanan was conducting a traffic stop, Officer Rivera drove to Buchanan to offer assistance (35:5, 12). Rivera arrived at the scene three to five minutes after Buchanan had arrived; and he found Buchanan alone with the two individuals in a dark area near a busy intersection (35:5, 12-13, 16-17).

After Buchanan received consent to search the car, Rivera asked Kyles, the passenger, to step out of the car so the search could be conducted (35:5-6). Buchanan at the time was on the driver's side trying to conduct the search (35:6). Describing Kyles as he got out of the vehicle, Rivera said:

> He got out of the vehicle, appeared a little nervous, was looking around, kind of trying to keep his hands in his pockets. I told him to keep his hands out of his pockets. I asked him-- At that time I was bringing him back to the rear of the vehicle and because he was acting suspicious, I asked him if he had anything illegal on him, any weapons or drugs, at that time and he stated no. That's when I told him I was going to conduct a pat-down of him for his safety and mine to check for weapons.

(35:6.)

When asked why he conducted the pat-down, Rivera said: "'Cause he was acting kind of nervous, suspicious, and I was looking for the possibility that he may have weapons on him" (35:6-7).

On cross-examination Rivera was asked whether he could see Kyles' hands (35:15). Rivera said Kyles stuck his hands into his coat pockets, which Rivera told him not to do (35:15). When the court asked whether Kyles kept his hands in his pockets or took them out, Rivera said: "He was-- like a nervous habit. He'd put them in, take them out, put them back in, take them out" (35:15). Rivera said that, when he had asked Kyles to step out of the car, Kyles immediately put his hands in his pockets (35:15-16). Rivera told Kyles to keep his hands out of his pockets (35:16). Rivera said that when Kyles reached the fender he (Rivera) again told him to take his hands out of his pockets; and Kyles cooperated (35:15-16).

Rivera said it was approximately four to eight seconds from the time he got Kyles out of the car until he patted him down (35:7).

Rivera said Kyles was wearing a "big, down, fluffy coat" (35:7). When asked on cross-examination whether he observed a bulge in Kyles' coat, Rivera said the coat was so fluffy that you could not see a bulge (35:15).

In terms of criminal activity, Rivera described the area where the stop occurred as "pretty active" (35:7).

On cross-examination, Rivera was asked: "And you didn't feel any particular threat before searching Mr. Kyles, correct?" (35:14). Rivera answered: "No, I did not" (35:14). Rivera acknowledged that Kyles did not try to flee; but Rivera said Kyles was looking around (35:16). Rivera agreed that it is common for people to act nervously when pulled over by the police (35:16).

When he patted down Kyles' outer clothing, Rivera felt a hard lump in the left pocket (35:7). Thinking the

object might be a weapon, Rivera pulled it out; and it was a plastic bag filled with seven or eight individual bags containing a green, leafy substance Rivera believed to be marijuana (35:7-9). Rivera explained that he had previously found weapons that felt like the object he felt while patting down Kyles (35:8-9).

Rivera arrested Kyles and took him to the public safety building (35:10). At the detective bureau, Rivera searched Kyles' clothing and found a bag of marijuana in the left sleeve of Kyles' coat (35:9-11).

B. Suppression hearing argument and decision.

The defense attorney argued that the suppression motion should be granted because Rivera had no articulable suspicion to justify the pat-down of Kyles (35:20-22; Pet-Ap. 105-07).

The prosecutor argued that several facts gave Rivera an articulable suspicion that justified the frisk: Kyles looked nervous; Kyles took his hands in and out of his pockets; it was dark; the stop was in a pretty active area for criminal activity; Rivera was alone with Kyles on that side of the car; and Kyles was wearing a puffy coat that could have held a weapon (35:22-23; Pet-Ap. 107-08).

The trial court believed that Rivera was justified in conducting the pat-down because Kyles put his hands in his pockets; but the court believed that the decision in *State v. Mohr*, 2000 WI App 111, 235 Wis. 2d 220, 613 N.W.2d 186, required it to grant the suppression motion (35:24, 26-27; Pet-Ap. 109, 111-12). The trial court said:

> I disagree with the [*Mohr*] decision but the decision is pretty self-evident. This guy has his hands in his pocket, removing it, has his hands in his pocked [sic], removing it. I would think there's a weapon there and I would

> have authorized the frisk just like Judge Becker. Court of Appeals disagrees so the evidence is suppressed.

(35:28; Pet-Ap. 113.)

In granting the motion, the trial court also noted that Rivera said he did not feel threatened (35:26, 28; Pet-Ap. 111, 113). At a subsequent hearing, the court said *Mohr* required that the officer have a reasonable fear for his or her own safety before doing a frisk; and the court found that Officer Rivera did not have the fear (37:5).

ARGUMENT

I. SUMMARY OF ARGUMENT.

The trial court thought that Officer Rivera's frisk of Kyles was justified because the court would have thought Kyles had a weapon when Kyles kept putting his hands in his pockets (35:26, 28; Pet-Ap. 111, 113).

The trial court, however, believed that *Mohr* required it to grant the suppression motion for two reasons: first, *Mohr* required that the officer subjectively have a reasonable fear for his safety before conducting a frisk, and the trial court found that Rivera did not feel threatened by Kyles; and, second, pursuant to *Mohr*, a suspect putting his hands in his pockets does not provide an officer with a reasonable belief that the suspect is dangerous (35:26-28; 37:5, 7; Pet-Ap. 111-13).

The court of appeals also relied on *Mohr* in affirming the trial court order suppressing the evidence. The court of appeals said that, as in *Mohr*, Kyles' nervousness and his actions in taking his hands in and out of his pockets provided no reasonable objective basis for believing that he was armed and dangerous. *State v. Kyles*, No. 02-1540-CR, slip op. at ¶¶2, 4-5 (Wis. Ct. App. Dist. II March 27, 2003); Pet-Ap. 102-03.

This court should reverse the decision of the court of appeals and decide that Officer Rivera was aware of sufficient facts to justify a frisk of Kyles. In reaching that decision, this court should overrule the *Mohr* decision because it was wrong in at least two respects: first, in making the officer's subjective fear of a suspect a prerequisite to conducting a frisk, the *Mohr* decision is contrary to the decisions in *Whren v. United States*, 517 U.S. 806 (1996), *State v. McGill*, 2000 WI 38, 234 Wis. 2d 560, 609 N.W.2d 795, and several decisions from other jurisdictions; and, second, in concluding that a nervous suspect keeping his hands in his pockets contrary to police orders fails to provide reasonable suspicion that the suspect is dangerous, the *Mohr* decision is contrary to numerous decisions.

In finding that the frisk of Kyles was valid, the court should conclude that the facts known to Rivera provided a reasonable belief that Kyles was dangerous. The key facts were Kyles' repeatedly putting his hands in the pockets of his fluffy coat contrary to Rivera's orders.

The first two issues presented for review in this court address whether *Mohr* should be overruled and whether a police officer must actually fear a suspect for a frisk to be valid. As reflected in the trial court's understanding of the *Mohr* decision, those two issues are related because the trial court thought that *Mohr* required the officer to subjectively fear the suspect for the frisk to be valid. The state, therefore, will address the requirement for the officer to subjectively fear the suspect when the state argues that *Mohr* should be overruled.

II. STANDARD OF REVIEW

The standard by which an appellate court reviews an order granting a motion to suppress evidence was stated in *State v. Morgan*, 197 Wis. 2d 200, 208, 539 N.W.2d 887 (1995):

> Upon review of an order granting suppression, this court will uphold the trial court's findings of fact unless they are against the "great weight and clear preponderance of the evidence." *State v. Kiper*, 193 Wis. 2d 69, 79, 532 N.W.2d 698 (1995) (quoting *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990)). However, deciding whether a search is unreasonable is a question of law that this court reviews without deference to the lower courts. *Betterly*, 191 Wis. 2d at 416-17.

In the second part of the analysis, the appellate court independently examines "the circumstances of the case to determine whether the constitutional requirements of reasonableness have been satisfied." *State v. Allen*, 226 Wis. 2d 66, 70, 593 N.W.2d 504 (Ct. App. 1999).

III. A FRISK FOR WEAPONS IS JUSTIFIED WHEN A POLICE OFFICER HAS A REASONABLE SUSPICION THAT A SUSPECT MAY BE ARMED.

"[P]rotective frisks are justified when an officer 'has a reasonable suspicion that a suspect may be armed.'" *McGill*, 234 Wis. 2d 560, ¶22, quoting *Morgan*, 197 Wis. 2d at 209. "The officer's reasonable suspicion must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Morgan*, 197 Wis. 2d at 209 (citation omitted).

The test for reasonable suspicion to justify the frisk is an objective standard. *McGill*, 234 Wis. 2d 560, ¶23; *Morgan*, 197 Wis. 2d at 209. "That standard is 'whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety and that of others was in danger.'" *McGill*, 234 Wis. 2d 560, ¶23, quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968). "[T]he determination of reasonableness is made in light of the totality of the circumstances known to the searching officer." *Morgan*, 197 Wis. 2d at 209.

In examining the record for facts that justified a frisk, the appellate court is not restricted "to the factors the officer testifies to having subjectively weighed in his ultimate decision to conduct the frisk." *McGill*, 234 Wis. 2d 560, ¶24. Applying the objective standard, the court "may look to any fact in the record, as long as it was known to the officer at the time he conducted the frisk and is otherwise supported by his testimony at the suppression hearing." *Id.*

IV. *STATE V. MOHR* SHOULD BE OVERRULED BECAUSE IT INCORRECTLY APPLIED THE OBJECTIVE TEST FOR REASONABLE SUSPICION, IT SET BAD PUBLIC POLICY AND IT FAILED TO RECOGNIZE THE DANGER EVINCED BY A SUSPECT PUTTING HIS HANDS IN HIS POCKETS CONTRARY TO POLICE ORDERS.

A. The *Mohr* decision is summarized.

In *Mohr*, Officer Tim McCarthy stopped a car at 1:00 a.m. on January 31, 1999, and found that it contained four passengers. *Mohr*, 235 Wis. 2d 220, ¶¶2-3. After having the driver perform field sobriety tests, McCarthy decided not to give the driver a traffic ticket, but only an oral warning. *Id.* at ¶¶3-4. At McCarthy's request, the driver consented to a search of the car. *Id.* at ¶4. McCarthy removed the passenger who was sitting behind the driver and McCarthy arrested him for underage consumption of alcohol. *Id.* at ¶5.

McCarthy next asked the front passenger his name and requested that he get out of the car. When McCarthy asked Mohr to sit in a squad car, Mohr refused and said he wanted to go home, which was only two blocks away. *Mohr*, 235 Wis. 2d 220, ¶6. McCarthy told Mohr to wait until his identification was confirmed. *Id.* Because it was

cold, McCarthy said Mohr should wait in a squad car. *Id.* "Mohr 'put his hands inside of his pockets and became really resistive.'" *Id.* McCarthy requested Mohr to remove his hands from his pockets, but Mohr refused to do so. *Id.*

McCarthy again requested Mohr to take his hands out of his pockets because McCarthy did not know what was in the pockets and Mohr was acting nervous and resistive. *Mohr*, 235 Wis. 2d 220, ¶7. After Mohr again refused to remove his hands from his pockets, McCarthy and another officer took Mohr's hands out of his pockets, put them behind his back and handcuffed him. *Id.*

About twenty-five minutes after the initial traffic stop and about five minutes after removing Mohr from the car, McCarthy frisked Mohr and found a baggie of marijuana in the jacket pocket. *Mohr*, 235 Wis. 2d 220, ¶¶8, 15, 16.

In finding that the frisk was unreasonable because the officer could not have objectively thought that Mohr was dangerous, the court said:

> The officer testified that the frisk was done for his safety and because Mohr refused to take his hands out of his pockets, but when this evidence is considered along with the fact that the frisk occurred approximately twenty-five minutes after the initial traffic stop, the most natural conclusion is that the frisk was a general precautionary measure, not based on the conduct or attributes of Mohr.

Mohr, 235 Wis. 2d 220, ¶15.

The court added in the next paragraph:

> Apparently, the officer was not concerned for his safety when he initially made the traffic stop because he did not order the passengers out of the vehicle. Nor was he concerned about his safety when he left the vehicle and its passengers unattended while spending twenty minutes with the driver and the minor. Although Mohr appeared nervous, was resistive and refused to remove his hands from his pockets, these circumstances did not give the

> officer a reasonable suspicion that Mohr was dangerous, especially when the officer had spent the previous twenty minutes at the scene without any suspicious incidents. Additionally, it is clear that backup units were on the scene, which obviated the officer's need to frisk Mohr before the vehicle search could proceed. We cannot agree that a reasonably prudent person in the officer's position would believe that his or her safety was in danger.

Mohr, 235 Wis. 2d 220, ¶16.

The *Mohr* decision misapplied the objective test for reasonable suspicion by considering the subjective intent of the police officer when it said the officer apparently was not concerned about safety since he left the passengers in the car for the first twenty minutes of the stop. *Mohr*, 235 Wis. 2d 220, ¶16. The court incorrectly considered the officer's subjective evaluation of the facts known to him and his apparent assessment of the risk of danger.

The *Mohr* decision also failed to recognize the danger posed to a police officer by a suspect who refuses to remove his hands from pockets that could conceal a weapon. The court said that a nervous Mohr who refused to remove his hands from his pockets failed to give the police officer a reasonable suspicion that he was dangerous. *Mohr*, 235 Wis. 2d 220, ¶16. In reaching this conclusion, the court of appeals did not cite or discuss cases from other jurisdictions that considered the issue. The conclusion in *Mohr* is contrary to the conclusions in numerous decisions from other jurisdictions.

B. In applying an objective test for reasonable suspicion, the *Mohr* decision erred in considering whether the police officer subjectively feared the defendant.

As reflected in statements in paragraphs 15 and 16 of *Mohr*, a significant factor in the court's reasoning was the

twenty-five-minute delay from the initial stop to the frisk during which time Officer McCarthy took no safety precautions. The *Mohr* court said the officer was not concerned for his safety because he did not order all the passengers out of the vehicle while he spent time with the driver and the minor passenger. *Mohr*, 235 Wis. 2d 220, ¶16. In relying on the officer's apparent lack of concern for safety, the *Mohr* court relied on the subjective intentions of the officer. It is not surprising that the trial court understood the *Mohr* decision as requiring the officer to subjectively fear the suspect for the frisk to be valid, and that one reason the trial court gave for granting the suppression motion was its finding that Rivera did not actually fear Kyles (35:26-28; 37:5, 7; Pet-Ap. 111-13).

There are two problems with the trial court basing its decision, even in part, on its belief that Rivera did not actually fear or feel threatened by Kyles. First, as shown in the next paragraph, such a conclusion is contrary to Rivera's testimony. Secondly, and more importantly, a police officer does not have to subjectively fear a suspect for a frisk to be valid. To the extent they rely on a need for actual fear of the suspect by the officer, the *Mohr* decision and the trial court and appellate court in this case are wrong.

Rivera's testimony shows that he conducted the frisk because he thought Kyles may have a weapon. When asked why he conducted a pat-down, Rivera said: "'Cause he was acting kind of nervous, suspicious, and I was looking for the possibility that he may have weapons on him" (35:6-7). He also testified that he told Kyles he was going to pat him down for safety to check for weapons (35:6).

On cross-examination, Rivera was asked: "And you didn't feel any particular threat before searching Mr. Kyles, correct?" (35:14). Rivera answered: "No, I did not" (35:14).

Rivera's answer is not inconsistent with the standard for a valid frisk. The Wisconsin Supreme Court has held "that an officer making a *Terry* stop need not reasonably believe that an individual *is* armed; rather, the test is whether the officer 'has a reasonable suspicion that a suspect *may* be armed.'" *Morgan*, 197 Wis. 2d at 209 (emphasis added). "'The officer need not be absolutely certain that the individual is armed." *Id.*, quoting *Terry*, 392 U.S. at 27.

Rivera's admission that he did not feel any particular threat is consistent with an admission that he was not certain that Kyles had a weapon; and it is also consistent with a reasonable suspicion that Kyles *may* be armed. Therefore, Rivera's testimony was not inconsistent with having reasonable suspicion to support a valid frisk.

The more important point, however, is that an officer's subjective belief as to the possible danger does not determine the validity of the frisk. Because an objective standard is applied to test for reasonable suspicion, courts have held that the frisk can be valid when the officer does not actually fear the suspect or when the record does not disclose whether or not he feared the suspect.

In *United States v. Tharpe*, 536 F.2d 1098, 1101 (5th Cir. 1976) (en banc), *overruled in part on other grounds, United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987) (en banc), in a passage quoted in many other cases, the court explained why there is no legal requirement that the officer feel scared for the frisk to be valid:

> We know of no legal requirement that a policeman must feel "scared" by the threat of danger. Evidence that the officer was aware of sufficient specific facts as would suggest he was in danger satisfies the constitutional requirement. *Terry* cannot be read to condemn a pat-down search because it was made by an inarticulate policeman whose inartful courtroom testimony is embellished with assertions of bravado, so long as it is clear that he was aware of specific facts which would warrant a reasonable person to believe he

> was in danger. Under the familiar standard of the reasonable prudent man, no purpose related to the protective function of the *Terry* rule would be served by insisting on the retrospective incantation "I was scared."

The court said that its analysis of the legality of the frisk "must focus on the facts known to the officer on the scene of the encounter, and the inferences of risk of danger reasonably drawn from the totality of those specific circumstances. Our concern is what the record shows the officer knew on the scene." *Tharpe*, 536 F.2d at 1100.

Since *Tharpe*, the United States Court of Appeals for the Fifth Circuit has at least twice confirmed its holding in *Tharpe*, 536 F.2d at 1101, that there is no legal requirement that a policeman must feel scared by the threat of danger for the frisk to be valid. *United States v. Baker*, 47 F.3d 691, 693-94 (5th Cir. 1995), and *United States v. Michelletti*, 13 F.3d 838, 842 (5th Cir.) (en banc), *cert. denied*, 513 U.S. 829 (1994).

The state was unable to find a Wisconsin Supreme Court decision or a United States Supreme Court decision that addressed the question of whether the officer must have a subjective fear of the suspect before the officer can conduct the frisk. However, Wisconsin Supreme Court and United States Supreme Court decisions have adopted the underlying rationale of *Tharpe*. That is, in examining Fourth Amendment cases, the two courts have held that the reviewing court applies an objective standard to the facts known to the officer and that the legal conclusions the officer made based on the facts does not determine whether the action taken was valid.

In *Whren*, 517 U.S. at 813, the Court repeated a prior holding that the subjective intent of the officer alone does not make otherwise lawful conduct illegal or unconstitutional. The Court said it had established that "'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not

invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" *Id.*, quoting *Scott v. United States*, 436 U.S. 128, 138 (1978). The Court stated that the subjective intent of the officer does not invalidate conduct that complies with the Fourth Amendment: "We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. . . . *Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.*" *Whren*, 517 U.S. at 813 (emphasis added).

In *United States v. Knights*, 534 U.S. 112, 122 (2001), the Supreme Court applied *Whren* to a situation where the standard was reasonable suspicion rather than probable cause. Therefore, in this case, where the standard is reasonable suspicion that Kyles was armed, the subjective intention of Officer Rivera should play no role in the reasonable suspicion Fourth Amendment analysis. As a result, the validity of the frisk should not depend upon whether Rivera had a subjective fear of Kyles. Because the court in *Mohr* rested its decision, at least in part, on the officer's apparent lack of subjective fear, the *Mohr* decision is contrary to the United States Supreme Court decisions in *Whren* and *Knights*.

In *United States v. Gonzalez*, 954 F.Supp. 48, 49-50 (D. Conn. 1997), the defendant argued that the protective search of the car was improper on the ground that the officer did not actually fear for his safety and was really looking for drugs. In concluding that the protective search was valid even if the officer did not actually fear for his safety, the court relied on *Ohio v. Robinette*, 519 U.S. 33 (1996), and *Whren* for their holdings that the subjective intent of the officer does not make otherwise lawful conduct unconstitutional. *Gonzalez* 954 F.Supp. at 50-51. Regardless of the officer's motivation, the actions of the officer are lawful as long as the facts known to him satisfy the objective test for the applicable probable cause or reasonable suspicion standard. *Gonzalez*, 954 F.Supp. at 51.

Therefore, because the *Mohr* decision rested, at least partially, on the principle that the officer had to subjectively fear the suspect for the frisk to be valid, the *Mohr* decision conflicts with *Whren*.

This court's decision in *McGill* is also inconsistent with *Mohr* and consistent with the holding in *Tharpe* that the officer does not have to subjectively fear the suspect for the frisk to be valid. In *McGill*, this court applied to a claim that the officer did not have reasonable suspicion to frisk the suspect the same objective standard that *Tharpe* used. After pointing out that the "reasonableness of a protective frisk is determined based upon an objective standard," *McGill*, 234 Wis. 2d 560, ¶23, this court said that it was not required to

> restrict its reasonableness analysis to the factors the officer testifies to having subjectively weighed in his ultimate decision to conduct the frisk. . . . We may look to any fact in the record, as long as it was known to the officer at the time he conducted the frisk and is otherwise supported by his testimony at the suppression hearing.

McGill, 234 Wis. 2d 560, ¶24.

The statement in *Tharpe*, 536 F.2d at 1101, that the constitutional requirement is satisfied as long as the officer was aware of sufficient facts to warrant a reasonable person believing he was in danger is consistent with the statement in *McGill*, 234 Wis. 2d 560, ¶24, that the reasonableness analysis is based on the facts known to the officer and is not restricted to the facts the officer subjectively relied upon in deciding to conduct the frisk. Also, the statement in *Tharpe*, 536 F.2d at 1100, that the officer's later verbalization of his thoughts and feelings is not dispositive of the reasonableness of conducting the frisk is consistent with the statement in *McGill*, 234 Wis. 2d 560, ¶24, that the court does not restrict "its reasonableness analysis to the factors the officer testifies to having subjectively weighed in his ultimate decision to conduct the frisk." In other words, the courts in both

Tharpe and *McGill* apply the objective standard to the facts known to the officer, not to the conclusions the officer made based on those facts.

The rationales of *Whren* and *McGill* demonstrate that the *Tharpe* court was correct in holding that there is no legal requirement that the officer must feel scared by the threat of danger to conduct a legal frisk.

The conclusion that the *Tharpe* holding is correct has been reinforced by the other court decisions with the same holding. Two of those decisions rejected arguments that were similar to the *Mohr* decision where it rested the conclusion that the officer did not believe he was in danger on the fact the officer left the passengers unattended in the car during the first twenty minutes of the stop. *Mohr*, 235 Wis. 2d 220, ¶16.

The initial officer in *United States v. Menard*, 95 F.3d 9, 10 (8th Cir. 1996), stopped a car, obtained consent from the driver to search the car, got the driver and the two passengers out of the car and started the search before a second officer arrived on the scene and reminded the first officer of a warning bulletin that Michael Walker, one of the passengers, carried an automatic pistol. At that point, the second officer frisked Walker and Menard and found that each had a gun. *Id.* As the court reasoned in *Mohr*, Menard argued that the first officer evidenced little if any concern for his safety while searching the car before the second officer arrived and the frisk was conducted. In rejecting Menard's argument, the court cited *Tharpe* for the proposition that the Fourth Amendment does not require that the police officer feel scared by the threat of danger.

In *O'Hara v. State*, 27 S.W.3d 548, 549 (Tex. Crim. App. 2000), the court answered "no" to the question "whether an officer must be afraid before a pat-down search is justified." The court said that whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and

circumstances confronting him at the time and "'not on the officer's actual state of mind at the time the challenged action was taken.'" *Id.* at 551, quoting *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985). The court explained that, regardless of whether the officer said he was afraid, the validity of the frisk is determined by analyzing whether the facts available to the officer at the time of the frisk would warrant a reasonably cautious person to believe that the action taken was appropriate. *O'Hara*, 27 S.W.3d at 551. The court said that, under the objective analysis, it did not matter whether the officer testified that he was afraid or was not afraid. *Id.* The majority opinion pointed out that the dissent incorrectly viewed the facts subjectively when the dissent noted that the officer apparently believed that the defendant was not dangerous and that the officer spent time with the defendant without trepidation prior to the frisk. *O'Hara*, 27 S.W.3d at 554.

Just as the dissent in *O'Hara* was incorrect in viewing the facts subjectively, the *Mohr* decision incorrectly viewed the facts subjectively when it stated that the officer was apparently not concerned for safety during the first twenty minutes of the stop when he left the passengers unattended in the car.

In *People v. Galvin*, 535 N.E.2d 837, 843 (Ill. 1989), where the officer testified that he at no time thought the defendants were armed, had weapons or that he was in danger, the court held that "an officer's subjective feelings may not dictate whether a frisk is valid."

In *State v. Dumas*, 786 So.2d 80, 81-82 (La. 2001), where the officers testified that they were not afraid of the suspect, the supreme court applied an objective test and said:

> The reasonableness of a frisk conducted as part of a lawful investigatory stop is also governed by an objective standard. *The relevant question is not whether the police officer subjectively believes he is in danger, or whether he articulates that subjective belief in his*

> *testimony at a suppression hearing, but "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."*

(Emphasis added.)

Quoting *Tharpe*, 536 F.2d at 1101, the court in *State v. Evans*, 618 N.E.2d 162, 169-70 (Ohio 1993), applied the objective test and rejected the opinion of the court of appeals that "a critical factor in determining whether the officer had reasonable suspicion that the detainee was armed is whether the officer is in fear for his or her safety."

In *State v. Roybal*, 716 P.2d 291, 293 (Utah 1986), citing *Tharpe*, 536 F.2d at 1101, the court said that in "assessing the reasonableness of the actions, we note that it is not essential that the officer actually be in fear."

The rationale employed by the cases holding that a valid frisk does not require that the officer actually fear the suspect is consistent with *Whren* and *McGill* because those cases as well as *Whren* and *McGill* apply objective tests and state that the officer's subjective intentions and analysis of the facts do not determine the validity of the frisk. The statements in *McGill*, 234 Wis. 2d 560, ¶24, dictate that in Wisconsin the validity of the frisk does not depend upon the officer actually fearing the suspect. Regardless of whether the officer subjectively fears the suspect, the frisk is valid if the facts and circumstances known to the officer satisfy the objective test for the validity of the frisk. *Id.*

The *Mohr* decision was inconsistent with *Whren* and *McGill* because it considered the subjective intent of the officer when it noted that his actions showed he was apparently not concerned for his safety during the first twenty minutes of the stop and because the court used the officer's apparent perception of the lack of danger as a reason for finding that the officer did not have reasonable

suspicion that Mohr was dangerous to justify the frisk. *State v. Mohr*, 235 Wis. 2d 220, ¶16.

The correctness of the cases that hold actual fear by the officer is unnecessary for the frisk to be valid is verified by examining the rationale employed by two leading cases that do require subjective fear by the officer for the frisk to be valid. In *Gonzalez*, 954 F.Supp. at 50, the court cited *United States v. Lott*, 870 F.2d 778, 783-84 (1st Cir.1989), and *United States v. Prim*, 698 F.2d 972, 975 (9th Cir.1983), as cases that require the officer to have subjective fear that is objectively reasonable for the protective search to be valid.

In *Lott*, 870 F.2d at 783, the trial court found that the officers did not fear for their safety when they conducted the frisk. In finding that a valid frisk required that the officers subjectively fear the suspect, the appellate court said in *Lott*, 870 F.2d at 783-84:

> Although *Terry* and *Long* speak in terms of an objective test ("reasonableness") for determining the validity of an officer's frisk for weapons, we do not read those cases as permitting a frisk where, although the circumstances might pass an objective test, the officers in the field were not *actually* concerned for their safety.

The court's emphasis on the officer's actual concern for safety is inconsistent with the statement in *Whren*, 517 U.S. at 813, that the constitutional reasonableness of the traffic stop does not depend on the actual motivation of the officers involved; and it is inconsistent with the statement in *McGill*, 234 Wis. 2d 560, ¶24, that the court is not required to "restrict its reasonableness analysis to the factors the officer testifies to having subjectively weighed in his ultimate decision to conduct the frisk." Because the reasoning in *Lott* is inconsistent with *Whren* and *McGill*, its holding would not be applied in Wisconsin.

In *Prim*, 698 F.2d at 977, the court concluded that the frisk was not justified because the officers' objective in

conducting the frisk was to find narcotics not to protect themselves against danger.

Prim is contrary to *Whren*, 517 U.S. at 812-13, and *Knights*, 534 U.S. at 122, where the subjective motivation and intent of the officer play no role in probable cause and reasonable suspicion Fourth Amendment analysis.

Tharpe, however, and the other cases holding that subjective fear by the officer is unnecessary for a frisk to be valid are consistent with *Whren* and *McGill*. Because *Mohr* relied, at least in part, on the officer's apparent lack of subjective fear as a reason for finding the frisk invalid, *Mohr* should be overruled because it was contrary to *Whren* and *McGill*. Because the court in *Mohr* considered the subjective intentions of the officer, the court incorrectly applied the objective standard that is used in evaluating the validity of a frisk. This court should make clear that in Wisconsin, as in *Tharpe* and the other cases consistent with it, subjective fear by the officer is not necessary for a frisk to be valid. The validity of a frisk is determined by examining the facts known to the officer and deciding whether a reasonably prudent man in those circumstances would be warranted in the belief that his safety and that of others was in danger. *McGill*, 234 Wis. 2d 560, ¶23.

C. The *Mohr* decision sets bad public policy because it encourages police to always order passengers out of a car during a traffic stop.

The *Mohr* decision sets bad public policy because it encourages police to always order passengers out of the car as soon as it is stopped.

In *Mohr*, 235 Wis. 2d 220, ¶¶2, 6, the car was stopped at 1:00 a.m. on a January day. The *Mohr* decision cites the officer's failure to order the passengers out as soon as the car was stopped as evidence that Mohr was not

dangerous. *Mohr*, 235 Wis. 2d 220, ¶16. The *Mohr* decision, therefore, provides incentive for police officers to always order passengers out of the car as soon as it is stopped, regardless of the weather conditions, so that the police can show they were concerned for their safety and to eliminate a reason for finding a frisk invalid. This is bad public policy. Ordering passengers out of the car does not provide reasonable suspicion that they were dangerous. Even if Officer McCarthy had ordered Mohr out of the car as soon as it was stopped, McCarthy would have had no reasonable suspicion that Mohr was dangerous until Mohr acted nervous and resistive and refused to remove his hands from his pockets. *Mohr*, 235 Wis. 2d 220, ¶6-7. Nevertheless, after the *Mohr* decision, police officers would be wise to always order passengers out of the car as soon as it is stopped just so the failure to order them out could not be held against the officer when he or she has reason to conduct a frisk.

The practice encouraged by *Mohr* is contrary to the concern expressed by a dissenting justice in *Maryland v. Wilson*, 519 U.S. 408 (1997). Justice Kennedy was concerned that the command for passengers to exit vehicles would become commonplace; but he said:

> Most officers, it might be said, will exercise their new power with discretion and restraint; and no doubt this often will be the case. It might also be said that if some jurisdictions use today's ruling to require passengers to exit as a matter of routine in every stop, citizen complaints and political intervention will call for an end to the practice.

Wilson, 519 U.S. at 423-24 (Kennedy, J., dissenting).

Justice Kennedy, therefore, did not believe it was wise for police to order passengers out of vehicles for every traffic stop. Because the *Mohr* decision provides incentive for police to order passengers out of vehicles in every traffic stop, it sets bad public policy, and the decision should be expressly overruled.

D. The *Mohr* decision failed to recognize the danger evinced by a suspect putting his hands in his pockets contrary to police orders.

The trial court in this case believed that the frisk was legitimate because it would think there was a weapon in Kyle's pockets when he repeatedly put his hands in and out of his pockets (35:26, 28; Pet-Ap. 111, 113). The court, however, granted the suppression motion because it believed that the *Mohr* decision dictated that Kyles' putting his hands into his pockets did not provide reasonable suspicion that he was armed. *Id.*

The court said in *Mohr*, 235 Wis. 2d 220, ¶16:

> Although Mohr appeared nervous, was resistive and refused to remove his hands from his pockets, these circumstances did not give the officer a reasonable suspicion that Mohr was dangerous, especially when the officer had spent the previous twenty minutes at the scene without any suspicious incidents. Additionally, it is clear that backup units were on the scene, which obviated the officer's need to frisk Mohr before the vehicle search could proceed. We cannot agree that a reasonably prudent person in the officer's position would believe that his or her safety was in danger.

(Footnote omitted.)

To the extent *Mohr* holds that a nervous suspect who refuses to comply with police orders to remove his hands from his pockets does not give a police officer reasonable suspicion that the suspect is dangerous, *Mohr* should be overruled. The *Mohr* decision did not discuss other cases when it reached its conclusion. It should have. Numerous cases from other jurisdictions have found that a frisk was justified when a suspect put his hands into his pockets, especially when he did so after being told by officers to keep his hands out of his pockets.

The cases finding reasonable suspicion to justify a frisk when a suspect puts his hands in his pockets will be

discussed in Argument V.F. of this brief when the state argues that the facts in this case provided reasonable suspicion that Kyles was armed. The argument showing why Officer Rivera had reasonable suspicion that Kyles was armed will also show why the *Mohr* decision should be overruled because it was wrong in holding that a nervous Mohr who was resistive and who refused to remove his hands from his pockets did not give the officer reasonable suspicion that he was dangerous. *Mohr*, 235 Wis. 2d 220, ¶16.

V. THE TOTALITY OF THE CIRCUMSTANCES KNOWN TO OFFICER RIVERA PROVIDED REASONABLE SUSPICION THAT KYLES WAS ARMED.

The totality of the circumstances known to Officer Rivera would provide a reasonably prudent person with reasonable suspicion that Kyles was armed. Rivera was aware of several facts that courts have recognized as contributing to a reasonable suspicion that a suspect is armed: the frisk occurred at about 8:45 p.m. after dark in an area where the level of criminal activity was described as "pretty active"; Kyles acted nervous; and, despite Rivera's direction to keep his hands out of his pockets, Kyles repeatedly put his hands in the pockets of his fluffy coat in which a weapon could have been concealed.

A. Time of day.

Kyles was frisked after the car in which he was the passenger was stopped at about 8:45 p.m. (35:6-7, 12, 18-19).

The time of day was cited as a factor contributing to reasonable suspicion when the frisks occurred in the evening or early morning. *McGill*, 234 Wis. 2d 560, ¶¶20, 32 (after 10 p.m.); *Morgan*, 197 Wis. 2d at 213-14

(4 a.m.); *State v. Williamson*, 113 Wis. 2d 389, 402, 335 N.W.2d 814 (1983) (2 a.m.); *Allen*, 226 Wis. 2d at 68, 77 (evening); *State v. Williamson*, 58 Wis. 2d 514, 517, 520, 206 N.W.2d 613 (1973) (about 11 p.m.).

In *McGill*, 234 Wis. 2d 560, ¶20, the court noted that the need for officers to frisk for weapons is more compelling today than it was at the time of *Terry*, and the court pointed out that the number of assaults on police officers in 1998 was more than double the number in 1966. *Id.* Referring to the increased number of assaults, the court said: "The vast majority of these assaults, approximately two-thirds, took place during the evening and early-morning shifts, between 6 p.m. and 4 a.m." *Id.*

As in *McGill*, *Morgan*, *Allen* and the two *Williamson* cases, the post-8:45 p.m. frisk in this case occurred during the period when the vast majority of assaults on police occur; and, as in those cases, the time of the frisk is a factor contributing to the reasonable suspicion that Kyles was armed.

B. Darkness.

When asked about the presence of natural light, Officer Chad Buchanan said it was "[c]ompletely dark" (35:18-19). When Officer Rivera was asked whether it was "light or dark out," he said it was "kind of dark" (35:4). On cross-examination, Rivera agreed that the street on which Kyles was stopped was well lit on one of the corners; but Rivera had earlier testified that when he arrived on the scene Buchanan was alone with two individuals in "a dark area" (35:5, 16-17). Therefore, even though the street was well lit on one of the corners, the record indicates that the stop occurred in a dark area of the street.

Darkness at the time of the frisk was cited as a factor contributing to reasonable suspicion that the suspect is armed in *McGill*, 234 Wis. 2d 560, ¶32, and *Williamson*,

113 Wis. 2d at 402. In *McGill*, 234 Wis. 2d 560, ¶32, the court explained: "We have consistently upheld protective frisks that occur in the evening hours, recognizing that at night, an officer's visibility is reduced by darkness and there are fewer people on the street to observe the encounter."

In this case, the darkness was a factor contributing to reasonable suspicion that Kyles was armed.

C. Amount of crime in the area.

When Officer Rivera was asked how he would describe the area in terms of criminal activity, he answered, "It's pretty active" (35:7).

In *Morgan*, 197 Wis. 2d at 211, the court said that an officer's perception of an area as "'high-crime'" can be a factor in justifying a frisk. In *Morgan*, 197 Wis. 2d at 204, the officer described the area as a "'fairly high-crime-rate area.'" In *Allen*, 226 Wis. 2d at 77, the court cited the "high-crime reputation of the area" as contributing to reasonable suspicion justifying frisk.

Just as the area descriptions of "fairly high-crime-rate" in *Morgan* and the "high-crime reputation of the area" in *Allen* were adequate for the courts to say the officers could consider the areas as high crime areas, so too in this case Rivera's description of the criminal activity as "pretty active" was sufficient to qualify the area as a high crime area for the purpose of evaluating reasonable suspicion.

In this case, then, the fact that the stop occurred in an area where Rivera described the level of criminal activity as "pretty active" contributed to the reasonable suspicion that Kyles was armed.

D. Kyles' nervousness.

Rivera said that when Kyles got out of the car he "appeared a little nervous" and "was looking around" (35:6). When asked why he conducted the pat-down, Rivera said: "'Cause he was acting kind of nervous, suspicious, and I was looking for the possibility that he may have weapons on him" (35:6-7). In response to a question from the court, Rivera said Kyles was taking his hands in and out of his pockets "like a nervous habit" (35:15).

"[A] suspect's overt nervousness *is* a legitimate factor to consider in determining whether a protective frisk was justified." *McGill*, 234 Wis. 2d 560, ¶29, citing *Morgan*, 197 Wis. 2d at 213, 215.

Kyles' attorney asked Rivera: "And it's common for people to act nervously when pulled over by the police, would you agree?" (35:16). Rivera answered: "I would agree" (35:16).

Rivera's acknowledgment that people pulled over by the police act nervously does not prevent the court from considering Kyles' nervousness as a factor contributing to reasonable suspicion that Kyles was armed. The suspects in *McGill* and in *Morgan* were in cars that were stopped by police and the supreme court still considered nervousness of the suspect as a factor in assessing reasonable suspicion. In addition, because he was not the driver of the car stopped by Officer Buchanan, Kyles had no reason to be nervous about the stop. As the passenger, Kyles would not be ticketed for a traffic violation. Thus, under the circumstances, it is proper to consider Kyles' nervousness as a factor contributing to the reasonable suspicion that Kyles was armed.

E. Kyles' fluffy coat.

Rivera testified that Kyles was wearing "a big, down, fluffy coat" (35:7). When he was asked by Kyles' attorney whether he observed any bulge in Kyles' fluffy coat that caused him to believe that there was a weapon in the jacket, Rivera said that the coat was "so fluffy you couldn't see the bulge" (35:15).

When the suspect is wearing a coat large enough to conceal a weapon, the coat can be a factor contributing to reasonable suspicion that the suspect is armed.

In *United States v. Douglas*, 964 F.2d 738, 741 (8th Cir. 1992), in identifying the factors that provided reasonable suspicion for the frisk, the court noted that "appellant was wearing a long coat which could have concealed a weapon."

In *United States v. Hines*, 943 F.2d 348, 350, 352 (4th Cir. 1991), the suspect's heavy, bulky coat that could conceal a weapon seems to be the primary factor cited by the court to justify the frisk.

In *United States v. Buchannon*, 878 F.2d 1065, 1067 (8th Cir. 1989), the court pointed out that the appellant was "wearing a long winter coat which might have concealed a weapon."

In *United States v. Mack*, 421 F.Supp. 561, 563 (W.D. Pa. 1976), one of the facts providing reasonable suspicion for the frisk was the suspect's trench coat that provided an opportunity for concealment of weapons.

In *State v. Vazquez*, 807 P.2d 520, 521, 523-24 (Ariz. 1991), the court cited the bulkiness of the leather jacket as a justification for the officer reaching into the pockets to check for a weapon.

In *People v. Frank V.*, 233 Cal. App. 3d 1232, 285 Cal. Rptr. 16, 18, 21 (1991), in finding that the frisk was

justified when the motorcycle passenger put his hands in his coat after the officer told him to take them out of the pockets, the court pointed out that the suspect was "wearing a heavy coat with his hands in his pockets."

In *State v. Stewart*, 721 So.2d 925, 927 (Ct. App. La. 1998), in finding the frisk of the burglary suspect justified, the court cited the defendant becoming nervous, backing away from the officer and continuing to place his hands in pockets of a jacket that could conceal a small handgun.

In *State v. Blackman*, 617 A.2d 619, 629 (Md. Ct. Spec. App. 1992), the court cited as one of several factors justifying the frisk the fact that the defendant wore a jacket that could conceal a gun.

In this case, Kyles' down coat that was so fluffy Rivera could not see a bulge is a factor that contributes to reasonable suspicion that Kyles was armed.

F. Kyles repeatedly putting his hands in his pockets.

Rivera testified that when Kyles got out of the vehicle, Kyles tried to keep his hands in his pockets, and Rivera told him to keep his hands out of his pockets (35:6, 15-16). On cross-examination, Rivera said Kyles repeatedly stuck his hands in his coat, which Rivera told him not to do (35:15). In response to the court's question whether Kyles kept his hands in the pockets or took them out, Rivera said: "He was-- like a nervous habit. He'd put them in, take them out, put them back in, take them out" (35:15).

The trial court found that Kyles put his hands in his pockets (35:26; Pet-Ap. 111). The court said: "This guy has his hands in his pocket, removing it, has his hands in his pocked [sic], removing it. I would think there's a weapon there" (35:28; Pet-Ap. 113).

The trial court said it believed the frisk was legitimate and it would have approved the frisk, but the court believed that the decision in *Mohr* required the court to grant the suppression motion (35:26-28, 31; Pet-Ap. 111-13, 116).

The trial court should have relied on its original instinct. Kyles' repeatedly putting his hands into his coat pockets along with the other factors discussed above provided reasonable suspicion that he was armed, thereby justifying the frisk.

The most significant factor in providing the reasonable suspicion for the frisk was Kyles repeatedly putting his hands in his pockets even though Rivera told him to keep his hands out of the pockets. Numerous cases have cited a suspect putting his hands in his pockets as contributing to reasonable suspicion that the suspect is armed.

In several cases, the suspect's putting his hands in his pockets or moving them toward his pockets was the primary, and sometimes only, factor that justified the frisk.

In *State v. LaGarde*, 758 So.2d 279, 282 (La. Ct. App. 2000), after noting that the defendant began to walk away at the sight of officers, the court said: "When he was called back to speak with them, he refused to remove his hands from his pockets upon request. Such refusal alone would have justified conducting a frisk for weapons."

In *Stewart*, 721 So.2d at 927, the court said that the officer was justified in frisking the defendant when he refused to comply with the officer's repeated requests that he place his hands on the police unit. The decision to frisk was reinforced when the defendant became nervous, backed away and kept placing his hands into his jacket pockets that could easily conceal a gun. *Id.*

In *State v. Spears*, 459 So.2d 1328, 1330-31 (La. Ct. App. 1985), after the officer summoned the defendant, he put his hand in his pocket, and the officer grabbed his arm and frisked him. The court said that the officer's concern that the defendant might be reaching for a weapon justified the frisk. *Id.* at 1331.

In *Harris v. State*, 567 A.2d 476, 502-03 (Md. Ct. Spec. App. 1990), after a car was stopped for speeding, the officer suspected that it was stolen. Because the defendant, who was a passenger, kept putting his hand up to his right breast pocket, the officer was justified in frisking him. *Id.* at 503.

In *Commonwealth v. Patti*, 579 N.E.2d 170, 171 (Mass. App. Ct. 1991), as the officer at 3:15 a.m. in a high crime area approached the theft suspect, the man put his hands in his jacket pockets; and the officer frisked him. The court found that the frisk was justified because the officer could have assumed that the man was reaching for a weapon. *Id.* 172.

In *People v. Laube*, 397 N.W.2d 325, 326 (Mich. Ct. App. 1987), after he was stopped for a civil infraction, the defendant acted nervous and continued to put his hands in his pockets after being told not to do so. The court said the defendant's behavior created a legitimate concern for safety to justify the frisk. *Id.* at 329.

In *People v. Robinson*, 718 N.Y.S.2d 524, 525 (N.Y. App. Div. 2000), the court found that the frisk was justified because the defendant repeatedly put his hand into his pocket despite the officer's request that he remove the hand from the pocket.

In *People v. Pettis*, 600 N.Y.S.2d 713, 421 (N.Y. App. Div. 1993), the court found that the frisk was justified because the suspect put his hand inside his jacket pocket and refused to remove it when requested.

In *Commonwealth v. Garcia*, 661 A.2d 1388, 1391 (Pa. Super. Ct. 1995), the officer suspected the defendant possessed drugs, stopped him and received the defendant's consent to search the car. The defendant refused to remove his hands from his pockets even after the officer asked him three times to remove his hands so they were visible. *Id.* Although the defendant waived his challenge to the denial of the suppression motion, the court said that it would have found the frisk justified in light of the defendant's suspicious conduct in refusing to remove his hands from his pockets. *Id.* at 1393 n.11.

Just as the officers in the above described cases had reasonable suspicion to conduct a frisk based solely or primarily on the defendant's hands being in his pockets, Officer Rivera in this case had reasonable suspicion to believe Kyles was armed when Kyles disobeyed Rivera's orders and continued to put his hands into the pockets of a fluffy coat that could conceal a weapon.

In the following cases, one of the main factors justifying the frisk of the suspect was the suspect having his hands in his pockets or moving his hands towards his pockets.

In *United States v. Harris*, 313 F.3d 1228, 1236 (10th Cir. 2002), the court said the most important factor justifying the frisk was that the defendant refused to take his hands out of his pockets after the officer requested that he do so. The court said that when the defendant refused to remove his hands, the officer was reasonably justified in believing that the defendant might be armed and dangerous. *Id.*

In *Michelletti*, 13 F.3d at 839, 842, the court found that the frisk was justified where the suspect came out of a bar and walked toward the officer with a beer in one hand and his right hand in his pants pocket "concealed precisely where a weapon could be located."

In *United States v. Mitchell*, 951 F.2d 1291, 1293 (D.C. Cir. 1991), as the first officer went to his vehicle to run a check on the car that was stopped, the assisting officer saw the passenger inside the car "moving both his hands inside his coat as he leaned forward." The court found that the officer's actions that led to the seizure of the gun from the passenger were reasonable based on his belief that the passenger had a gun after observing the passenger moving his hands under the coat. *Id.* at 1296.

In *United States v. Lane*, 909 F.2d 895, 900 (6th Cir. 1990), the court cited the suspect's repeated attempts to reach into his coat pocket after the officer told him to keep his hands on the wall as one factor in providing reasonable suspicion that the suspect was armed.

In *United States ex rel. Griffin v. Vincent*, 359 F.Supp. 1072, 1076 (S.D.N.Y. 1973), the court said the suspect's sudden reach inside his jacket put the policeman on alert for his own safety; and the officer's reasonable perception of danger to his own safety validated the frisk.

In *Reyes v. United States*, 758 A.2d 35, 38-39 (D.C. 2000), the court said the suspect's placing his hands in his pockets after confronting the police and subsequently refusing to open his hand generated a legitimate safety concern that justified the frisk.

In *Dickerson v. State*, 909 S.W.2d 653, 655 (Ark. Ct. App. 1995), the officer frisked a man suspected of selling drugs after the man made repeated attempts to put his hand into his coat pocket. In finding the frisk valid, the court cited the man's behavior and the fact he repeatedly attempted to reach for something in his coat pocket. *Id.*

In *Frank V.*, 285 Cal. Rptr. at 18, the passenger on the stopped motorcycle tried to put his hands back into the front pockets of his bulky leather jacket after the officer told him to keep the hands out; and the officer frisked the passenger. In finding the frisk valid, the court said the specific factor that justified the frisk was the defendant

starting for his pockets again, after being told to take his hands out. *Frank V.*, 285 Cal. Rptr. at 21

In *State v. Gannaway*, 191 N.W.2d 555, 556 (Minn. 1971), the officer frisked the driver after a traffic stop. In finding the frisk valid, the court said that "Gannaway's reaching for his outer coat pocket, even after being warned not to do so, gave Officer Pelton reasonable cause to initiate a protective frisk for weapons." *Id.* at 556-57.

Professor LaFave also cites a suspect reaching into his pocket or refusing to remove his hand from his pocket as a factor providing reasonable suspicion to justify a frisk. 4 Wayne R. LaFave, *Search and Seizure*, § 9.5(a), nns. 58, 59, 59.1, 76, 78 (3d ed. 1996).

Just as the defendant putting his hands in his pockets or refusing to remove them from pockets in the above described cases was a significant factor in finding reasonable suspicion that the defendant was armed, in this case Kyles repeatedly putting his hands into the pockets of his fluffy coat even after Rivera ordered him to keep them out provided reasonable suspicion that Kyles was armed.

This court also has found that the position of the suspect's hands can be a factor in justifying a frisk.

In describing the suspect's action prior to the frisk in *McGill*, 234 Wis. 2d 560, ¶8, the officer said: "'He twitched and acted nervous with his hands. He kept moving his hands to his pockets.'" This court found that the frisk was justified; and, referring to the officer's testimony that McGill twitched and acted nervous with his hands, the court said: "This fact in particular justified the officer's suspicions about the presence of a weapon and supports the reasonableness of the frisk." *McGill*, 234 Wis. 2d 560, ¶31.

In this case, Rivera said Kyles kept putting his hands in and out of his pockets like a nervous habit (35:15). As

in *McGill*, Kyles' repeatedly putting his hands in his pockets supports the reasonableness of the frisk.

In *Williamson*, 113 Wis. 2d at 402, the court found the suspect's actions threatening when he turned away from the officer in the dark so that the officer could not see his hands. In this case, Kyles' actions in the dark in repeatedly putting his hands in his pockets despite Rivera's directions not to do so were threatening to the officer and justified the frisk.

The cases discussed above recognize that an officer has a legitimate, objective concern for his safety when a suspect reaches for his pockets; and the concern is exacerbated when the person continues to reach for his pockets after the officer tells him to keep his hands out of the pockets. The number of cases and the explanations of why an officer could reasonably suspect that a person was armed when the person keeps his hands in his pockets or moves them to his pockets demonstrate why the *Mohr* decision should be overruled for concluding that Mohr's nervousness and refusal to remove his hands from his pockets failed to provide reasonable suspicion that he was armed.

In this case, Kyles' refusal to keep his hands out of his pockets when ordered to do so by Rivera was the primary factor that justified Rivera in reasonably suspecting that Kyles was armed.

G. The totality of the circumstances provided reasonable suspicion that Kyles was armed.

The trial court correctly concluded that in its opinion the frisk was legitimate (35:26; Pet-Ap. 111). The court said that it would think there was a weapon in a pocket when Kyles put his hands in and out of the pockets repeatedly (35:28; Pet-Ap. 113). The court granted the

suppression motion only because it thought the *Mohr* decision required that result (35:26-28; Pet-Ap. 111-13).

The totality of the circumstances provided reasonable suspicion that Kyles was armed. The stop occurred in the dark in an area where the criminal activity was described as "pretty active." Kyles was described as nervous when he was asked to get out of the car even though he was not the driver of the car stopped and had no apparent reason to be nervous. The most significant fact providing the reasonable suspicion that Kyles was armed was that he repeatedly put his hands into the pockets of his fluffy coat that could conceal a weapon even though Officer Rivera was telling him to keep his hands out of the pockets. As demonstrated by the cases cited above, Kyles' nervousness and repeatedly putting his hands into his coat pockets contrary to the orders from Rivera in a dark area where the criminal activity was pretty active provided the specific and articulable facts that reasonably warranted the frisk because a reasonably prudent man in the circumstances would be warranted in the belief that his safety was in danger. *McGill*, 234 Wis. 2d 560, ¶¶22-23; *Morgan*, 197 Wis. 2d at 209.

In finding that the totality of the circumstances justified the frisk of Kyles, this court should expressly overrule *Mohr's* reliance on the subjective intent of the police officer as a factor in assessing reasonable suspicion and this court should overrule *Mohr's* conclusion that a suspect's nervousness and refusal to remove his hands from his pockets when ordered to do so by the police officer fails to provide reasonable suspicion to frisk the suspect.

CONCLUSION

For the reasons discussed above, the State of Wisconsin requests this court to reverse the decision of the court of appeals and to reverse the trial court's order granting the suppression motion. Upon reversal of the

suppression order, the case should be remanded for further proceedings. The state also asks this court to overrule *State v. Mohr*.

Dated this 13th day of August, 2003.

PEGGY A. LAUTENSCHLAGER
Attorney General

Stephen W. Kleinmaier

STEPHEN W. KLEINMAIER
Assistant Attorney General
State Bar #1014422

Attorneys for Plaintiff-
Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8908

CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 10,943 words.

Stephen W. Kleinmaier
STEPHEN W. KLEINMAIER

A P P E N D I X

INDEX TO APPENDIX

COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-1540-CR Cir. Ct. No. 01-CF-1130

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

JOSHUA O. KYLES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals from an order granting Joshua Kyles's motion to suppress evidence gathered during a traffic stop. We conclude the suppression motion was properly granted and affirm.

¶2 Kyles was a passenger in a car that was pulled over for not having its headlights on after dark. The driver of the car consented to have the car searched. After observing Kyles standing around taking his hands in and out of his pockets during the traffic stop, one of the officers decided to do a protective pat down search for weapons and discovered marijuana in Kyles's pocket. A search incident to arrest revealed more marijuana in Kyles's jacket.

¶3 The parties agree that the legality of the initial protective search turns on whether the police had a reasonable basis to suspect that Kyles might be armed and dangerous, and that this court reviews that question de novo. ***State v. McGill***, 2000 WI 38, ¶¶17 and 21, 234 Wis. 2d 560, 609 N.W.2d 795. The State argues that police did have reasonable suspicion under ***McGill***, while Kyles argues that they did not, citing ***State v. Mohr***, 2000 WI App 111, 235 Wis. 2d 220, 613 N.W.2d 186.

¶4 In ***McGill***, the Wisconsin Supreme Court determined that officers reasonably conducted a protective search on a person who drove his car around barricades onto a closed road, did not pull over when police activated their lights, attempted to walk away from his vehicle to avoid the police, appeared unusually nervous and smelled of drugs and alcohol. ***McGill***, 2000 WI 38 at ¶¶27-33. The court also noted that it was dark out and the officer conducting the stop was alone. In ***Mohr***, this court determined that officers lacked reasonable suspicion to believe that a passenger in a car that was pulled over for traffic violations was armed and dangerous merely because he appeared nervous and refused to take his hands out of his pockets after the driver of the car had consented to have the car searched. ***Mohr***, 2000 WI App 111 at ¶15. We noted that there were backup officers present, the passengers were allowed to sit in the car while field sobriety tests

were performed on the driver, and that the frisk was not performed until twenty-five minutes after the initial stop. ***Id.*** at ¶16.

¶5 We agree with Kyles that ***Mohr*** and ***McGill*** are factually distinguishable and that the facts of this case are more similar to ***Mohr*** than ***McGill***. Like Mohr, Kyles was a passenger, rather than the driver of a car pulled over for a routine traffic stop, and the only stated basis for the protective search was that Kyles appeared nervous and had his hands in his pockets. Also, as in ***Mohr***, there were backup officers present at the scene, and there was better lighting than was present in ***McGill***. We conclude there was no reasonable objective basis to believe that Kyles was armed and dangerous, and the protective search was invalid. Because the initial protective search was improper, there was no basis for the arrest, and the subsequent search was also invalid. The trial court properly excluded the evidence from both searches.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

STATE OF WISCONSIN | CIRCUIT COURT | KENOSHA COUNTY

FILED
APR 23 2002
CARL ERICE
Clerk of Circuit Court

STATE OF WISCONSIN,

Plaintiff,

-vs-

File No. 01-CF-1130

Hon. David M. Bastianel

JOSHUA O. KYLES,

Defendant,

[redacted]

Having heard the testimony of Kenosha Police Department Officers Rivera and Buchanan and the arguments of counsel at the suppression hearing on February 21, 2002, and for the reasons stated on the record:

IT IS HEREBY THE ORDER OF THIS COURT THAT the defendant's motion to suppress i granted for the reasons stated on the record February 21, 2002.

Dated at Kenosha, Wisconsin this 23rd day of April 2002

CIRCUIT COURT KENOSHA CO. WISCONSIN

Honorable David M. Bastianelli
Kenosha Circuit Court Branch 1

Approved as to Form:
Jodi L. Meier
Attorney for the Defendant

search it.

Q. And did you do that in this case?

A. Yes.

Q. And did Officer Rodriguez-- Strike that. Did Officer Rivera assist you with this stop?

A. Yes.

MS. RUSCH: I don't have anything further.

THE COURT: Cross.

MS. MEIER: None.

THE COURT: Thank you. You may step down. Is this your last witness.

MS. RUSCH: That's it.

THE COURT: If the other officers want, they can come in, I assume.

MS. RUSCH: Yes.

THE COURT: Okay. Do you have evidence you desire to present, Counsel?

MS. MEIER: No.

THE COURT: Okay. Statement.

MS. MEIER: Well, I don't believe that there was any articulable suspicion that Officer Rivera testified to that would justify his pat-down. It was non-consensual, it was without a warrant, it was not incident to arrest, it was after a minor traffic stop.

I presented the Court this morning a couple of cases that I believe are somewhat similar and that the Court should follow the rationales within those cases and suppress the evidence here. I'm not going to go reiterate the cases unless the Court didn't have a chance to read my motion since I filed--

THE COURT: I've read it.

MS. MEIER: Okay. There has to be something more than what Officer Rivera testified to. From four to eight seconds from the time he stepped out to the time he patted Mr. Kyles down I don't think-- there's not a whole lot can happen within that time for him to even find some suspicion, much less be able to articulate something to that effect.

Appearing nervous, as I argued in my brief, is not sufficient or shouldn't be sufficient in and of itself. That's typical behavior. And that Mr. Kyles looked around, again I don't know how much-- how many times he can look around within a four to eight-second period of time, and that in and of itself shouldn't be sufficient enough either to justify searching this particular matter.

It was a traffic stop for a minor traffic violation on a busy street near a busy intersection that on 60th Street is a well-lit street. There was officers, more than one officer. Officer Buchanan didn't request

assistance.

So when you take the totality of the circumstances, it was nothing dangerous about the stop. He was just assisting. And, again, within that short time period, four to eight seconds, I don't see how any kind of conclusion can be made within that time period that would justify the search of Mr. Kyles.

THE COURT: Thank you. Ms. Rusch.

MS. RUSCH: Your Honor, this was a legitimate Terry stop for a traffic infraction. The stop was followed by consent provided to Officer Buchanan by the vehicle operator, which was testified to by both officers.

Pursuant to the consent to search, both the passenger and driver were asked to exit the vehicle. Officer Rivera testified that when he asked the defendant, the passenger, to exit the vehicle, the defendant appeared nervous. He looked around. The officer testified he was behaving suspiciously. This is based on the officer's experience, not only a little over a year as a Kenosha police officer, but also experience in terms of conducting numerous pat-down searches with respect to his prior employment as a jailer.

He indicated the defendant took his hands in and out of his pockets fairly quickly, given the time frame, and the officer testified, I believe several times, that he was

concerned for his safety and conducted a pat-down search. I think under the pat-down search case law, pursuant to a Terry stop, the officer articulated factors which would justify the frisk combined with it being dark out, an active criminal activity area-- or he described the criminal activity in the area. I think he described it as a pretty active area.

He was alone with the defendant on that side of the car at the time. He described the defendant as looking around as though he were going to flee. He didn't actually take off or refuse to comply with the orders but it was the defendant's movements, eye contact, behavior which caused the officer concern in addition to this puffy coat, which could have been housing any type of weapon, that justified the outer garment pat-down search for weapons.

He felt something which could have been a weapon and he removed that. He didn't search the undergarments. He didn't manipulate garments.

So I think under State vs. Mohr and State vs. Morgan it is a legitimate pat-down search pursuant to legitimate Terry stop.

THE COURT: Thank you. Actually, I think State vs. Mohr is contrary to the position, Ms. Rusch. My purview as the trial judge is similar to what Judge Becker's was in State vs. Mohr. The fourth amendment

prohibits unreasonable searches and seizures and there's really no discussion of that. I consider it reasonable where you're patting down an individual for your own safety after they're out of the car to conduct a search to be a reasonable search. Unfortunately, the Court of Appeals disagrees with me.

State vs. Mohr. Let me go through the facts of that. In State vs. Mohr there was a legitimate stop just like here. Police Officer Tim McCarthy was conducting routine patrol when he observed a blue vehicle cross the roadway centerline. He stopped the vehicle, routine traffic stop. There are four people in the vehicle. He decided not to give the driver-- all people apparently had been drinking-- a ticket but asked if he can do a consent search. The driver said okay. They let all four people out.

The passenger in the vehicle got out and here's what the passenger did. He asked the passenger, Mohr, his name and requested he exit the vehicle for officer safety. Mohr exited the vehicle. McCarthy noticed Mohr stumbled getting out of the car and smelled of strong intoxicants. He wanted to place Mohr in his squad car with the other passengers but it was filled so he told Mohr to sit in the next available squad car. Mohr refused. He stated that he wanted to go home. McCarthy responded he had not confirmed Mohr's identity yet Mohr replied his house was only two

blocks away and he was going home.

McCarthy once again told him no and that he should wait for his identification to be confirmed. Because it was cold outside, he stated that Mohr should wait in the squad car. Mohr put his hands inside his pockets, became really resistive. For officer safety reasons, Officer McCarthy requested Mohr remove his hands from his pocket. Mohr refused to do so.

Basically, there were other officers at the scene. They then basically took his hands out of his pockets, frisked him, and found marijuana. After the arrest Mohr moved the Court to suppress the evidence because he committed-- challenged the legality of the detention and frisk, raising the issue that the officers lacked reasonable suspicion to perform the frisk for weapons.

The trial court basically, because he wouldn't remove his hands from his pockets, found it was reasonable, etc. The Court of Appeals reversed. Court of Appeals reasoning was as follows:

> Mohr does not question the legality of initial traffic stop. He contends that the stop and frisk of his person were unlawful because they were not based on a reasonable suspicion of criminal

activity and dangerousness.

The Court of Appeals indicated:

> Having reviewed all the facts and circumstances set forth in the record, we conclude that the frisk was unreasonable because the officer could not have objectively thought that Mohr was dangerous. The officer testified the frisk was done for his safety and because Mohr refused to take his hands out of his pockets, but when this evidence is considered along with the fact the frisk occurred--

in this case some time after the traffic stop.

MS. RUSCH: 25 minutes, Judge.

THE COURT: Yes. But that's not what's really relevant. There's no evidence in the record, Ms. Rusch, to show there's any indication either party was dangerous. Nothing wrong with the initial stop.

As a matter of fact, the officer testified he did not feel threat from the defendant before he searched him. This is for safety. I think if you put the hands in the pocket, you should to be able 'cause I think it's legitimate. The Court of Appeals for the Second District does not. There's no question in my mind this isn't even as

aggravated as Mohr was and the Court reversed the trial court.

So I grant the motion to suppress 'cause there's no articulable, objective information here that there was indications that he was in fact dangerous as opposed to frisking him for officer safety. So the Court of Appeals decision has decided that's not reasonable and that's the case in this district, Ms. Rusch.

MS. RUSCH: Judge, just so it's clear, I cited Mohr orally because it is so distinguishable from this case, in my opinion, in that what the Court of Appeals found incredible about the circuit court's finding was that the officer thought Mohr was dangerous when the officer waited 25 minutes.

THE COURT: No. No. They didn't arrest it on the 25 minutes, Ms. Rusch.

MS. RUSCH: That's what we're trained. And I've read the case and I've been to numerous trainings and that's what we are told they did arrest it on.

THE COURT: I don't know what they told you. It-- that's not what they arrested it on. There's no indication the Court saw that objectively Mohr is dangerous. There's nothing in this record that the officer believed he was dangerous or any fear-a-tive gestures. It was safety. As a matter of fact, the officer testified in

this case he "did not feel a threat from the defendant."

And that is not enough according to the court in Mohr. I disagree with the decision but the decision is pretty self-evident. This guy has his hands in his pocket, removing it, has his hands in his pocked, removing it. I would think there's a weapon there and I would have authorized the frisk just like Judge Becker. Court of Appeals disagrees so the evidence is suppressed.

MS. RUSCH: All of it?

THE COURT: The other is fruits of the poisonous tree. There's no-- in time lapse. If he wouldn't have been arrested for the marijuana, they wouldn't have got the evidence at the station.

MS. RUSCH: Well, Judge, I obviously pursued on the theory that I believe that the frisk is legitimate but I'm not so sure that there's not an inevitable discovery because there were warrants for the traffic so the defendant's arrest--

THE COURT: This defendant?

MS. RUSCH: Out of county. This defendant. However, they were geographically limited type warrants out of Dane County or something.

THE COURT: No. No. Was there a warrant for this defendant? I don't care about geography limits. The Court issues a warrant. Whether they say we

don't want him because he's out of our county is irrelevant.

MS. RUSCH: While there were warrants for his arrest, I believed the pat-down was legitimate so I didn't ask the officers about that.

THE COURT: Okay. Then it may not be fruit of the poisonous tree.

MS. MEIER: I would-- I would disagree with that because there were warrants out of Dane County which had a restriction.

THE COURT: No. No. I never know of a warrant with a restriction. The Court issues a warrant for an arrest which is good throughout the State. The county officers may say, well, if they pick you up in Waukesha, don't bother.

MS. MEIER: Well, first of all, that's not the testimony that was presented.

MS. RUSCH: Because--

MS. MEIER: Well, it wasn't. It wasn't the testimony that was presented.

THE COURT: There was no testimony presented on the issue.

MS. MEIER: Exactly, that there were warrants, correct. So if you are going to--

THE COURT: Then I'll reopen it. If it's a fruit of the poisonous tree-- that's the only reason

you're going to get suppressed, if there's a warrant and they also arrested him for that.

MS. MEIER: From my understanding with law enforcement is that they cannot arrest if there is a warrant with a geographic restriction on it, and I've asked other police officers that very same thing.

THE COURT: I guess I have a question. In the statutes is there such a thing as a warrant with geographic location?

MS. MEIER: And, quite frankly, I don't know. I can't tell you that offhand. Maybe the police officers know.

THE COURT: Well, we'll come back on that because I'll reopen the evidence if there's also a warrant. I didn't realize there was a warrant. There was something about a warrant. I thought it was for the driver of the vehicle.

MS. RUSCH: No. There was a warrant for him, for this defendant. But, again, I think it's pretty-- the record's pretty clear what my thoughts were is that I believed this case was very distinguishable from Mohr in that it was a legitimate pat-down and then search incident to arrest for the fruits of the pat-down. There were warrants. I didn't pursue that with the officers.

THE COURT: I realize you didn't

pursue it. The point of the matter is, what I'm saying is the initial frisk under Mohr is not justified because there is no independent indication the officer felt he was in fact dangerous. It was done strictly for safety and the officer even testified to that.

The point of the matter now is if there's other evidence seized, is it fruit of the poisonous tree. If there was another basis for taking him in, i.e. after he arrested him we also determined a warrant and when he's down there on the warrant we're now doing a custodial search, that's a whole different story.

MS. MEIER: But he wasn't arrested on the warrant. He was arrested because he had marijuana in his pocket.

THE COURT: They don't have to say quote, unquote if they're aware of the warrant. The warrant is the warrant.

MS. MEIER: I don't--

THE COURT: That's what I'm saying. Because the officer says, well, our friendly police department in Dane says, hey, if you pick him up in Kenosha, don't bother calling us, does that make the judge's warrant any less valid? Does the judge's warrant say only pick them up if they're in Dane County or Jefferson? I seriously doubt it.

STATE OF WISCONSIN | CIRCUIT COURT | KENOSHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

CRIMINAL COMPLAINT

FILE NO. 01-CF- 1130

KPD 01-164986
Hon. Bruce E. Schroeder

FILED
DEC 28 2001
GAIL GENTZ
CLERK OF CIRCUIT COURT

JOSHUA O. KYLES
4609 37TH AVENUE #1
KENOSHA, WI 53144

M/B DOB: 04/10/76

FILED
JUL 08 2002
CLERK OF COURT OF APPEALS
OF WISCONSIN

Defendant.

Detective Tom Blaziewske, being first duly sworn, on oath says that on December 23, 2001, at the City of Kenosha, in said County, the defendant did, intentionally and unlawfully possess Tetrahydrocannabinol with intent to deliver, as a felony repeater and drug repeater. This conduct is in violation of Wisconsin statutes 961.41(1m)(h)1 and 961.48(1) and 939.62(1)(b), **POSSESSION OF TETRAHYDROCANNABINOL WITH INTENT TO DELIVER AS A FELON REPEATER AND AS A DRUG REPEATER**, an unclassified felony with maximum penalties of a fine of not less than $1,000 nor more than $50,000 and imprisonment for not more than 15 years, or both.

DRUG REPEATER

The basis upon which your complainant believes the defendant to be convicted previously of a drug offense is a review of the Kenosha County Circuit Court file judgment of conviction in 94-CF-59. This judgment of conviction reveals the defendant was convicted on March 23, 1994, of one count of DELIVERY OF COCAINE BASE – PARTY TO A CRIME, receiving three years prison less 287 days. This conviction is still of record and has not been overturned.

REPEATER ALLEGATION

The basis upon which your complainant believes the defendant to be a felony repeater is a review of the judgment of conviction in Dane County Circuit Court file 97-CF-314. This judgment of conviction reveals the defendant to have been convicted on April 15, 1997, on a count of POSSESSION WITH INTENT TO DELIVER COCAINE, a felony. As to this offense, the defendant in file 97-CF-314 was sentenced to six years prison. This conviction is still of record and has not been overturned.

PROBABLE CAUSE

On December 23, 2001, at approximately 8:45 p.m. Kenosha Police Officer Buchanan observed a vehicle traveling west bound on 60th Street in the 2700 Block, in the City of Kenosha, State of Wisconsin, without its headlights lighted. Officer Buchanan stated he stopped the vehicle, a black Chevrolet Impala WI plate 279BWZ,

in the 2900 Block of 60th Street, in the City of Kenosha. Officer Buchanan stated he approached the vehicle a spoke to the operator identified with a WI photo driver's license as Charlie B. Nelson. Officer Buchanan stated advised Nelson that his headlights weren't on and Nelson then turned them on by pulling on a knob on the da Officer Buchanan stated Kenosha Police officer Rivera was on scene as backup and spoke to the passen identified with photo identification card as Joshua O. Kyles. Officer Buchanan stated he returned to his squad a ran both subjects through MDC. Officer Buchanan stated CIB showed that Kyles had five commitments throu Madison Police Department however there was a geographic restriction to adjacent counties to Dane Coun Officer Buchanan stated CIB also showed Nelson and Kyles both had prior drug arrests. Officer Buchanan stat he returned to Nelson's vehicle and asked Nelson if he had anything illegal in the vehicle like drugs or weapo and Nelson advised that he did not. Officer Buchanan asked Nelson if he could search his vehicle and Nels advised that he could. Officer Buchanan stated he had Nelson step out of his vehicle and patted him down officer safety. Officer Buchanan stated Officer Rivera patted Kyles down for officer safety and recovered transparent plastic bag containing a green, leafy substance that Officer Buchanan believed to be marijuana Kyles' jacket pocket. Officer Buchanan stated he searched Nelson's vehicle and found an open bottle Hennessey Cognac approximately two-thirds full. Officer Buchanan stated that at the Public Safety Building up doing a more thorough search of Kyles, Officer Rivera discovered a large bag of a green, leafy substance in t sleeve of Kyles' jacket. Officer Rivera stated the green leafy substance tested positive for marijuana using marijuana field test kit and had a total weight of 7.38 oz. Also located on Kyles' person was U.S. currency denominations of: (1) $20, (6) $5.00 and (18) $1.00 bills.

The basis for complainant's knowledge of such offense is your complainant is a detective with the Kenosha Poli Department and has knowledge of the above offense from having reviewed the written report of Officer Buchanan and Rivera whose statement is presumed reliable as they prepared them in the normal course of the duties as law enforcement officers.

Subscribed and sworn to before me and
approved for filing on 12/28/01

Complainant

K. Richard Wells
(Assistant) District Attorney

I find that probable cause ~~(exists) (does not exist)~~ that the crime was committed by the defendant and order that h be (held to answer thereto) ~~(released forthwith)~~.

Date: December 28, 2001

~~(Judge)~~ (Court Commissioner)

:kln

NOTICE TO DEFENDANT RE: DEMAND FOR DISCOVERY

Pursuant to Wis. Stat. §971.23(2m), the State of Wisconsin, plaintiff, demands that the defendant or the defendant's attorney, within a reasonable time before trial, disclose to the District Attorney and permit the District Attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody, or control of the defendant:

1. A list of all witnesses, other than the defendant, whom the defendant intends to call at trial, together with their addresses;

2. Any relevant written or recorded statements of a witness named on the witness list referred to above, including any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings on the subject matter of his or her testimony, and including the results of any physical or mental examination, scientific test, experiment or comparison that the defendant intends to offer in evidence at trial;

3. The criminal record of a defense witness, other than the defendant, which is known to the defense attorney. If the defense attorney is uncertain if the witness has a criminal record, please provide the witness's full name, sex, race, and date of birth;

4. Any physical evidence that the defendant intends to offer in evidence at trial.

Robert J. Jambois
District Attorney

3

STATE OF WISCONSIN CIRCUIT COURT KENOSHA COUN

STATE OF WISCONSIN,

Plaintiff,

vs.

JOSHUA O. KYLES,

Defendant.

INFORMATION

FILED

JAN 4 2002

GAIL GENTZ
CLERK OF CIRCUIT COURT

FILE NO. 01-CF-1130

~~Hon. Bruce E. Schroeder~~

Robert J. Jambois

I, ~~Susan L. Karaskiewicz, Deputy~~ District Attorney for said County, hereby inform the Court that December 23, 2001, in the City of Kenosha, in said County, the defendant did intentionally and unlawfu possess Tetrahydrocannabinol with intent to deliver, as a felony repeater and drug repeater. This conduct is violation of Wisconsin statutes 961.41(1m)(h)1 and 961.48(1) and 939.62(1)(b), **POSSESSION TETRAHYDROCANNABINOL WITH INTENT TO DELIVER AS A FELON REPEATER AND AS DRUG REPEATER**, an unclassified felony with maximum penalties of a fine of not less than $1,000 nor m than $50,000 and imprisonment for not more than 15 years, or both.

and against the peace and dignity of the State of Wisconsin.

Dated this 4th day of January, 2002.

~~Deputy~~ District Attorney

Copy to Attorney J. Ross on 1-4, 2002.

KYLESjoshua_inf010302

a

STATE of Wisconsin, Plaintiff-Respondent,

v.

Jeff S. MOHR, Defendant-Appellant.

Court of Appeals

No. 99-2226-CR. Submitted on briefs December 1 1999.—Decided April 26, 2000.

2000 WI App 111

(Also reported in 613 N.W.2d 186.)

RESEARCH REFERENCES

Am Jur 2d, Searches and Seizures §§ 74, 78–80, 191, 19
See ALR Index under Search and Seizure; Stop and Fris

1. **Appeal and Error § 766*—motion to suppress-dard of review.**

When appellate court reviews motion to suppress ev it will uphold trial court's findings of fact unless tl clearly erroneous.

2. **Criminal Law and Procedure § 788.50*—sto frisk—constitutionality—review.**

Whether stop and frisk meets constitutional standa questions of law that appellate court decides without ence to trial court's decision.

3. **Searches and Seizures § 32.70*—stop and frisk sonableness.**

Police officer must have reasonable fear for his or h sonal safety before effectuating frisk.

*See Callaghan's Wisconsin Digest, same topic and section num

4. Searches and Seizures § 33.70*—stop and frisk—probable cause.

Where stop and frisk of defendant, who was passenger, occurred during vehicle search consented to by driver after driver had been given oral warning for minor traffic violations, and after officer had spent previous 20 minutes at scene without any suspicious incidents and it was clear that backup units were on scene which obviated officer's need to frisk defendant before vehicle search could proceed, although defendant appeared nervous, was resistive and refused to remove his hands from his pockets, these circumstances did not give police officer reasonable suspicion that defendant was dangerous, and appellate court concluded that reasonably prudent person in officer's position would not believe that his or her safety was in danger and therefore search was unlawful and drug evidence seized during unlawful search should have been suppressed.

APPEAL from a judgment of the circuit court for Washington County: RICHARD T. BECKER, Judge. *Reversed.*

On behalf of the defendant-appellant, the cause was submitted on the brief of *Eileen A. Hirsch*, assistant state public defender of Madison.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of *Kathleen M. Ptacek*, assistant attorney general, and *James E. Doyle*, attorney general.

Before Brown, P.J., Anderson and Snyder, JJ.

¶ 1. ANDERSON, J. Jeff S. Mohr appeals from a judgment of conviction for marijuana possession contrary to WIS. STAT. § 961.41(3g)(e) (1997–98),[1] by

[1] All references to the Wisconsin Statutes are to the 1997–98 version unless otherwise noted.

*See Callaghan's Wisconsin Digest, same topic and section number.

arguing that the trial court's refusal to suppress evidence the police obtained when they stopped and frisked him was in error. Mohr maintains that the officer did not have a reasonable suspicion that he was engaged in criminal activity or that he was armed and dangerous. We conclude that the totality of the circumstances do not supply reasonable suspicion that Mohr was a danger to the officer to support the frisk. Therefore, we reverse.

BACKGROUND

¶ 2. At the motion hearing, the following testimony was presented. At 1:00 a.m. on January 31, 1999, City of West Bend Police Officer Tim McCarthy was conducting routine patrol, when he observed a blue vehicle cross the roadway's center line. As he continued to observe the vehicle, it drove straight through a left turn lane at a speed approximately ten miles over the speed limit. McCarthy activated the squad car's emergency lights and pulled over the vehicle to conduct a traffic stop.

¶ 3. As McCarthy approached the vehicle, he noted that it contained four passengers. While asking the driver for identification, he detected a strong odor of intoxicants coming from within the vehicle. In response to McCarthy's questioning about whether he had been drinking, the driver responded that he had not, but that the group was returning from a party in Milwaukee. McCarthy requested that the driver perform field sobriety tests. The driver exited the vehicle, while the other passengers remained inside.

¶ 4. The field sobriety tests and a preliminary breath test revealed that the driver was not intoxicated. McCarthy decided not to give the driver a traffic citation, but an oral warning. He next asked the driver

for permission to search the vehicle, and the driver consented.

¶ 5. McCarthy walked back to the vehicle, requested identification from the passenger directly behind the driver's seat and asked the passenger to exit the vehicle for officer safety reasons. He observed that the passenger had been drinking alcohol. Because this passenger was also a minor, McCarthy arrested him for underage consumption of alcohol, *see* WIS. STAT. § 125.07(4)(b), and placed him in the squad car being monitored by another officer. The driver was also waiting in the squad car. By this time, three officers and squad cars were at the scene.

¶ 6. McCarthy returned to the vehicle, this time approaching the front seat passenger. He asked the passenger, Mohr, his name and requested that he exit the vehicle "for officer safety." Mohr exited the vehicle. McCarthy noticed that Mohr stumbled getting out of the car and smelled strongly of intoxicants. He wanted to place Mohr in his squad car with the other passengers, but it was filled, so he told Mohr to sit in the next available squad car. Mohr refused. He stated that he wanted to go home. McCarthy responded that he had not confirmed Mohr's identity yet. Mohr replied that his house was only two blocks away, and he was going home. McCarthy once again told him no and that he should wait for his identification to be confirmed. Because it was cold outside, he stated that Mohr should wait in the squad car. Mohr "put his hands inside of his pockets and became really resistive." For officer safety reasons, McCarthy requested that Mohr remove his hands from his pockets, but Mohr refused to do so.

¶ 7. McCarthy again requested that Mohr take his hands out of his pockets because McCarthy did not know what was in the pockets, and Mohr was acting

nervous and resistive. Once again, Mohr refused to remove his hands from his pockets. McCarthy and another officer took Mohr's hands from his pockets, put them behind his back and handcuffed them for officer safety.

¶ 8. About four or five minutes after he first asked Mohr to exit the vehicle, McCarthy began to frisk him. Starting the frisk on Mohr's right side, McCarthy felt a lighter in the pants pocket. He removed the lighter because of the potential damage it could cause to the squad car and Mohr. As McCarthy began to move to frisk Mohr's left side, Mohr tried to guard his left-side jacket pocket. During the frisk, McCarthy "felt what appeared to be a large plastic baggie" with some "soft material in the inside of it" in the jacket pocket. Thinking that it could be contraband, he removed it. The baggie contained marijuana, and McCarthy placed Mohr under arrest for possessing it.

¶ 9. After his arrest, Mohr moved the court to suppress the evidence because he challenged the legality of his detention and frisk. At the motion hearing Mohr asserted, among other things, that the officer lacked a reasonable suspicion to perform the frisk for weapons. The court determined that there was reasonable suspicion to stop the vehicle, the driver consented to the vehicle search and it was appropriate and reasonable to ask the vehicle's passenger to exit the vehicle to conduct the search. In denying the motion, the court reasoned that the frisk was reasonable because Mohr refused to take his hands out of his pockets.

¶ 10. After his suppression motion was denied, Mohr entered into a plea agreement with the State to rescind the repeat offender portion of his charge in exchange for his guilty plea. After Mohr pled guilty to

the marijuana possession charge, the court sentenced him to serve forty-five days in jail with Huber privileges, suspended his motor vehicle operating privileges for six months and required him to pay the court costs. Mohr appeals, challenging the court's rejection of his suppression motion.

DISCUSSION

[1, 2]

¶ 11. When we review a motion to suppress evidence, we will uphold the trial court's findings of fact unless they are clearly erroneous. *See State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, whether a stop and frisk meet constitutional standards are questions of law that we decide without deference to the trial court's decision. *See State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999).

[3]

¶ 12. In order to justify a stop and frisk, the officer "must be able to point to specific and articulable facts which, taken with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). An officer must have a reasonable fear for his or her personal safety before effectuating a frisk. *See State v. Williamson*, 113 Wis. 2d 389, 403–04, 335 N.W.2d 814 (1983).

¶ 13. Once the officer has articulated the facts that caused him or her to act, those facts are assessed against an objective standard: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a [person] of reasonable caution in the belief' that the action taken was appropriate?" *Terry*, 392 U.S. at 21–22. There is no set standard for what constitutes a reasonable police reaction in all situa-

tions. Rather, the reasonableness of the reaction depends upon the circumstances facing the officer. *See Bies v. State*, 76 Wis. 2d 457, 468 & n.7, 251 N.W.2d 461 (1977). The court must examine the totality of the circumstances to determine whether the stop and frisk were justified. *See Penister v. State*, 74 Wis. 2d 94, 100, 246 N.W.2d 115 (1976).

¶ 14. Mohr does not question the legality of the initial traffic stop. He contends that the stop and frisk of his person were unlawful because they were not based on a reasonable suspicion of criminal activity and dangerousness. The stop and frisk were justified, the State responds, for officer safety reasons. Indeed it is well established that an officer's concern for his or her safety during a traffic stop is a legitimate and weighty consideration. Clearly, the "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." *Maryland v. Wilson*, 519 U.S. 408, 414 (1997). We begin our discussion by considering whether the frisk was permissible.

¶ 15. Having reviewed all of the facts and circumstances set forth in the record, we conclude that the frisk was unreasonable because the officer could not have objectively thought that Mohr was dangerous. The officer testified that the frisk was done for his safety and because Mohr refused to take his hands out of his pockets, but when this evidence is considered along with the fact that the frisk occurred approximately twenty-five minutes after the initial traffic stop, the most natural conclusion is that the frisk was a general precautionary measure, not based on the conduct or attributes of Mohr.

¶ 16. When the officer first stopped the vehicle, he ordered the driver out of the car and permitted the

passengers to remain inside. Ten minutes later, after the officer had finished giving the driver field sobriety tests and gotten his permission to search the vehicle, the officer reapproached the vehicle, ordering the driver's-side rear passenger out and permitting the other passengers to remain. Another ten minutes elapsed while the officer dealt with that passenger. The officer then returned to the vehicle and requested that Mohr get out of it. The frisk was begun after another five minutes passed. Apparently, the officer was not concerned for his safety when he initially made the traffic stop because he did not order the passengers out of the vehicle. Nor was he concerned about his safety when he left the vehicle and its passengers unattended while spending twenty minutes with the driver and the minor. Although Mohr appeared nervous, was resistive and refused to remove his hands from his pockets, these circumstances did not give the officer a reasonable suspicion that Mohr was dangerous, especially when the officer had spent the previous twenty minutes at the scene without any suspicious incidents. Additionally, it is clear that backup units were on the scene, which obviated the officer's need to frisk Mohr before the vehicle search could proceed. We cannot agree that a reasonably prudent person in the officer's position would believe that his or her safety was in danger.[2]

¶ 17. We also consider noteworthy the fact that the stop and frisk of Mohr occurred during a vehicle

[2]The State makes numerous arguments contending that the stop was lawful. We do not address these arguments because we resolve this appeal on the frisk issue. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if resolution of one issue is dispositive, this court need address other issues raised).

search consented to by the driver after he had been given an oral warning for minor traffic violations. Although the consensual search is not at issue here, we observe, as have other appellate courts, that an increasing number of appeals present situations in which police officers routinely ask permission to do drug and weapon searches of motor vehicles following stops for minor traffic infractions. *See, e.g., Whitehead v. State*, 698 A.2d 1115, 1116–17 (Md. Ct. Spec. App. 1997); *United States v. Lattimore*, 87 F.3d 647, 649 (4th Cir. 1996) (testifying at a suppression hearing, police officer admits that he searches ninety-seven percent of the vehicles he stops). It is reasonable for an officer to ask a vehicle's passengers to step out of the car to facilitate the search. *See Maryland*, 519 U.S. at 415. However, a frisk is a more serious intrusion of a person's liberty than being asked to step out of a vehicle during a traffic stop. "Few citizens would find it acceptable to be frisked at a traffic stop for a minor traffic violation because the driver consented to a search of the car." *United States v. Hale*, 934 F. Supp. 427, 430 (N.D. Ga. 1996).

CONCLUSION

[4]

¶ 18. We conclude that the frisk of Mohr was unlawful because the officer lacked reasonable, articulable facts to prove that he believed him to be dangerous. It follows that the drug evidence seized during the unlawful frisk must be suppressed. *See State v. Phillips*, 218 Wis. 2d 180, 204–05, 577 N.W.2d 794 (1998). Mohr's suppression motion should have been granted. That being the case, there is no evidence to support Mohr's conviction for marijuana possession, and, accordingly, we reverse his conviction.

By the Court.—Judgment reversed.

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 02-1540-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JOSHUA O. KYLES,

Defendant-Respondent.

REVIEW OF A DECISION OF COURT OF APPEALS AFFIRMING AN ORDER SUPPRESSING EVIDENCE, ENTERED IN THE KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE DAVID M. BASTIANELLI, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

EILEEN A. HIRSCH
Assistant State Public Defender
State Bar No. 1016386

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566

Attorney for Defendant-Respondent

TABLE OF CONTENTS

Page

CASES CITED

STATUTES CITED

Wisconsin Statutes:

OTHER AUTHORITIES CITED

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 02-1540-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JOSHUA O. KYLES,

Defendant-Respondent.

REVIEW OF A DECISION OF COURT OF APPEALS AFFIRMING AN ORDER SUPPRESSING EVIDENCE, ENTERED IN THE KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE DAVID M. BASTIANELLI, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

ISSUES PRESENTED

I. **SHOULD THE DECISION IN *STATE V. MOHR,* 2000 WI APP 111, 235 WIS. 2d 220, 613 N.W. 2d 186, AND THE APPELLATE COURT DECISION IN THIS CASE BE OVERRULED BECAUSE THEY EMPLOYED A SUBJECTIVE STANDARD IN DECIDING THE SUPPRESSION MOTION?**

The trial court held: "So I grant the motion to suppress 'cause there's no articulable, objective information here that there was indications that he was in fact dangerous . . . ." 35:26-27; App. 108-09.

The court of appeals held: "We conclude there was no reasonable objective basis to believe that Kyles was armed and dangerous, and the protective search was invalid." Op. ¶ 5.

Neither court considered overruling ***State v. Mohr***.

II. SHOULD THE DECISION IN *STATE V. MOHR* BE OVERRULED BECAUSE IT FAILED TO FIND THAT "HANDS IN POCKETS" CONTRARY TO POLICE ORDERS CREATED A REASONABLE SUSPICION JUSTIFYING A SEARCH?

The court of appeals did not address this issue.

III. UNDER THE TOTALITY OF THE CIRCUMSTANCES, DID THE OFFICER HAVE AN OBJECTIVELY REASONABLE SUSPICION THAT MR. KYLES WAS ARMED AND DANGEROUS?

The trial court answered: No.

The court of appeals answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Kyles believes that oral argument and publication are warranted.

STATEMENT OF FACTS

Respondent supplements the appellant's statement of facts in two ways:

First, Officer Rivera described lighting conditions at the site of the traffic stop as "kind of dark." (35:4). He also testified that the stop was on a busy street near a busy intersection, and that it was well lit at "one of the corners." (35:16-17). Officer Buchanan's testimony that it was "completely dark," was in response to a question whether it was "light, dark, dusk" as it related to the stop for operating without headlights "after the sun had set," not as to lighting conditions at the scene. (35:18-19).

Second, the state's quotation from the trial court's decision does not fairly describe the court's reasoning. In addition to the quoted portion of its decision, the trial court gave a lengthy analysis of the facts of this case, compared them to ***State v. Mohr, supra,*** and said to the prosecutor: "There's no evidence in the record, Ms. Rusch, to show there's any indication either party was dangerous." (35:23-28; State's App. 108-113). The court's legal conclusion was this:

> So I grant the motion to suppress 'cause there's no articulable, objective information here that there was indications that he was in fact dangerous as opposed to frisking him for officer safety.

35:26-27; App. 111-12.

ARGUMENT

I. NEITHER *STATE V. MOHR* NOR THE APPELLATE COURT DECISION IN THIS CASE REQUIRED THAT THE OFFICER SUBJECTIVELY FEAR THE PERSON WHO WAS FRISKED, IN ORDER TO JUSTIFY THE FRISK.

A. Introduction and standard of review.

The state asks this court to reverse the suppression decision of the court of appeals in this case, and to overrule ***State v. Mohr, supra***, on the grounds that ***Mohr*** was erroneously decided in two respects, and that the court of appeals in this case relied upon ***Mohr***.

First, it argues that the ***Mohr*** decision erroneously makes "the officer's subjective fear of a suspect a prerequisite to conducting a frisk." The argument mischaracterizes ***Mohr's*** clear and specific reliance on an objective standard:

> Having reviewed all of the facts and circumstances set forth in the record, we conclude that the frisk was unreasonable because the officer could not have objectively thought that Mohr was dangerous.
>
> . . . .
>
> We conclude that the frisk of Mohr was unlawful because the officer lacked reasonable, articulable facts to prove that he believed him to be dangerous.

2000 WI App 111, ¶¶ 15, 18.

Similarly, the court of appeals in this case unambiguously relied upon an objective standard: "We conclude there was no reasonable objective basis to believe that Kyles was armed and dangerous . . ." Op, ¶ 5.

The state's "subjective fear" argument, therefore, is based on a convoluted interpretation of court of appeals decisions in both ***Mohr*** and this case.

Second, the state argues that the ***Mohr*** decision erred by concluding that "a nervous suspect keeping his hands in his pockets contrary to police orders fails to provide reasonable suspicion that the suspect is dangerous," contrary to "numerous decisions." (Brief, p. 8). The argument misstates the facts. Neither Mohr nor Kyles were "suspects." Both were mere passengers in cars being searched pursuant to the consent of the driver after stops for minor traffic violations. In neither case was there any hint or suspicion of criminal activity. Additionally, "numerous cases" do not establish the ***per se*** rule sought by the state, but instead hold that "hands in pockets" is but one factor to consider in weighing the totality of the circumstances.

In this case, Officer Rivera had no constitutional or statutory basis to frisk Mr. Kyles because he did not have "reason to believe that he is dealing with an armed and dangerous individual." ***Terry v. Ohio***, 392 U.S. 1, 27 (1968). ***See also*** Wis. Stat. § 968.25 allowing a search for weapons when the officer "reasonably suspects that he or she or another is in danger of physical injury." Officer Rivera cited insufficient "specific and articulable facts which, taken together with rational inferences from those facts" to reasonably warrant the frisk in this case. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W. 2d 830, 834 (1990).

The standard of review and overview of general standards governing protective frisk searches by police are correctly set forth by the state.

B. *State v. Mohr* applied an objective standard in determining whether the frisk was constitutional.

In considering this issue, it is instructive to review the ***Mohr*** decision and the state's brief with an essential analytical difference in mind: To *require* that the officer fear the subject of a frisk in order for the frisk to be valid, is fundamentally different from *considering* the officer's assessment of threat to safety in determining whether the frisk was valid.

The state's summary of argument, (state's brief p. 8) asserts that ***Mohr*** made the officer's subjective fear "a prerequisite," and that it "required the officer to subjectively fear the suspect," and addresses "the requirement for the officer to objectively fear the suspect."

In contrast, at page 12 of its brief when it describes the ***Mohr*** decision in more detail, the state contends that the ***Mohr*** court erred by "considering the subjective intent" of the officer and "considered the officer's subjective evaluation." At page 13 of its brief, the state appears to concede that the ***Mohr*** decision does not "require" subjective fear, but concludes, "[t]o the extent they rely on a need for actual fear of the suspect by the officer," the ***Mohr*** decision is wrong.

This analytical difference is crucial to this case because only a tortured or convoluted reading of ***Mohr*** could result in an interpretation that it *required* subjective fear by the officer to justify a frisk.

Mohr begins with a statement of the objective requirement, under ***Terry v. Ohio***, 392 U.S. 1, 21 (1968), that the officer point to specific and articulable facts justifying the frisk. ***Id.***, ¶ 12. It next states that the facts "are assessed against an objective standard," again citing

Terry. Id., ¶ 13. After discussion of the party's arguments, the court concludes "that the frisk was unreasonable because the officer could not have ***objectively*** thought that Mohr was dangerous." ***Id.,*** ¶ 15, (emphasis added).

In explaining its conclusion, ***Mohr*** notes that the officer testified that he conducted the frisk for "his safety," but concludes that the frisk was a "general precautionary measure, not based on the conduct or attributes of Mohr." ***Id.***, ¶ 15. In discussing "officer safety" further, as it related to the facts of the case, the decision points out that the officer apparently did not fear for his safety for the first twenty minutes of the encounter with Mohr. The very next sentence in that paragraph of the decision, however, points to the specific, articulable facts leading to the officer's lack of fear for his safety—that the first twenty minutes had revealed no "suspicious incidents:"

> Although Mohr appeared nervous, was resistive and refused to remove his hands from his pockets, these circumstances did not give the officer a reasonable suspicion that Mohr was dangerous especially *when the officer had spent the previous twenty minutes at the scene without any suspicious incidents.*

Id., ¶ 16 (emphasis added).

This sentence summarizes the objective evidence in the case--that Mohr's nervousness, resistance, and refusal to remove his hands from his pockets—followed twenty minutes of police-citizen contact that had yielded no objective facts pointing to Mohr's dangerousness. The paragraph concludes, once more, with a statement of the objective standard: "We cannot agree that a reasonably prudent person in the officer's position would believe that his or her safety was in danger." ***Id.***, ¶ 16.

Finally, the conclusion of the ***Mohr*** decision states:

> We conclude that the frisk of Mohr was unlawful because the officer lacked reasonable, articulable facts to prove that he believed him to be dangerous.

Id., ¶ 18.

The ***Mohr*** court repeatedly stated its reliance upon the objective "reasonably prudent officer" standard in determining whether the frisk was constitutionally justified. Its brief reference to the officer's perception of danger was nothing more than a comment on the evidence. Even that comment was backed by reference to objective evidence that the first twenty minutes of the police-citizen encounter had resulted in no "suspicious incidents."

This court should not accept the state's convoluted interpretation of the court's brief reference to the officer's perception of safety, in the context of the court's repeated reliance on the objective standard, to re-define ***Mohr*** as requiring the officer's subjective fear of the person who was frisked.

C. The court of appeals in this case properly applied an objective standard.

The state argues that the court should reverse the court of appeals decision in this case because it relied upon ***Mohr***, and because it interprets the trial court's remarks as requiring subjective fear by the officer.

First, the trial court's decision in this case, like that of the court of appeals in ***Mohr,*** begins and ends with reference to the correct objective standard. In response to the state's argument, the court replied: "There's no evidence in the record, Ms. Rusch, to show there's any indication either party was dangerous." 35:26; App. 111. Like ***Mohr*** the trial court then made the distinction

between "officer safety" as a general precautionary concept, and dangerousness based on articulable, objective information about the subject of the search, pointing out that he "did not feel threat from the defendant before he searched him." Finally, the trial court decided the motion, specifically basing it on an objective standard:

> So I grant the motion to suppress 'cause there's no articulable, objective information here that there was indications that he was in fact dangerous . . . .

35:26-27; App. 108-09.

Second, the court of appeals decision in this case unequivocally relied upon the objective standard, not once mentioning the officer's subjective beliefs:

> We conclude there was no reasonable objective basis to believe that Kyles was armed and dangerous, and the protective search was invalid.

Op., ¶ 5; App. 103.

The state's argument that the court of appeals applied a subjective standard in this case is simply wrong.

D. Because the decisions in this case and in *Mohr* relied upon an objective standard, the state's extended discussion of pretextual stop cases, and cases in which an officer's subjective perception of danger determined the validity of the stop or frisk, is irrelevant.

Mr. Kyles has no quarrel with the holdings in ***Whren v. United States***, 517 U.S. 806 (1996); ***United States v. Knights***, 534 U.S. 112 (2001); ***State v. McGill***, 2000 WI 38, 234 Wis. 2d 560, 609 N.W. 2d 795, and other federal and state cases cited by the state for the proposition that the officer's subjective intent or

subjective belief as to possible danger does not *determine* the constitutional validity of the frisk.

Every case cited by the state at pages 14 to 22 of the state's brief deals with the issue of whether the officer's subjective intent or belief *determined* the constitutional validity of the search. In ***Whren*** and ***Knights, supra,*** the defendants conceded objective grounds for the stop or search, but argued that the officers' use of those objective grounds as a pretext to justify their subjective intents to search for other reasons, rendered the stop or search invalid. In other cases cited by the state, the courts held there is "no legal requirement" that the officer be frightened, (state's brief p. 8), that the officer's subjective feelings "may not dictate whether a frisk is valid," (p. 19), and "it is not essential that the officer actually be in fear," (p. 20).

Because neither ***Mohr***, nor the court of appeals decision in this case even arguably holds that the validity of the search is determined by the officer's statement of fear, the cases cited in this section of the state's brief for the proposition that the officer's subjective intent or belief is not required for a search to be valid, are irrelevant to this case and will not be addressed further by Mr. Kyles.

E. To the extent that the state argues courts cannot consider officer perceptions of safety or danger, the state's argument is wrong.

As noted earlier in this brief, there is an important distinction between *requiring* that the officer fear the subject of a frisk in order for the frisk to be valid, and *considering* the officer's assessment dangerousness, in determining whether the frisk was valid – a distinction overlooked by the state in its brief.

All of the cases cited by the state discuss whether an officer's stated perception of danger is essential to justify a frisk. Undersigned counsel is unaware of any case that holds that the court may not consider whether the officer feared for his safety.

The standard for determining the constitutionality of a frisk requires both "specific and articulable facts" and "rational inferences from those facts." ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W. 2d 830, 834 (1990). The "rational inferences" a court may draw from facts may be informed by police testimony, based upon their training, experience, and perceptions based on the situation in which the officer is placed.

This court has repeatedly recognized that police officer training and experience is relevant to the objective stop and frisk analysis. In ***State v. McGill,*** 2000 WI 39, ¶ 42, 234 Wis. 2d 560, 610 N.W. 2d 94, the court held:

> In determining whether probable cause exists, we may consider the officer's previous experience [citation omitted] and also the inferences that the officer draws from that experience and the surrounding circumstances.

In ***State v. Morgan***, 197 Wis. 2d 200, 539 N.W. 2d 887 (1995), for example, the court did not require objective proof that a stop was made in a "high crime area." Instead, the court held "that *an officer's perception* of an area as 'high crime' can be a factor justifying a search." ***Id.***, 211. (emphasis added).

In ***State v. Allen***, 226 Wis. 2d 66, 593 N.W. 2d 504 (Ct. App. 1999), the court noted that individual factors cited as grounds for the stop and frisk, "standing alone, would not be enough to create reasonable suspicion." However, it found that the factors, "*combined with the officer's experience and training,*" as well as other factors, created enough reasonable suspicion to justify the stop and frisk. ***Id.***, at 75 (emphasis added).

In ***State v. Waldner***, 206 Wis. 2d 51, 445 N.W. 2d 681 (1996), the court noted that the reasonableness of a stop and frisk "is a common sense test. What would a reasonable police officer reasonably suspect in light of his or her training and experience." ***Id.***, at 56, citing ***State v. Anderson,*** 155 Wis. 2d 77, 83, 454 N.W. 2d 763 (1990).

A police officer's experience and training may cut both ways. Just as an officer may perceive danger based on facts, an officer may also perceive a lack of danger. LaFave, ***Search & Seizure,*** § 3.2(c), at 40-41, (3d ed. 1996).

The brief reference to officer perception of danger in ***Mohr***, and in the trial court's oral comments on the evidence in this case, is no more reliance on a subjective test than it was for the ***Morgan*** court to rely on the officer's testimony that he perceived himself to be in a "high crime area." If ***Mohr*** is overruled, this court will also need to overrule the decisions in ***Morgan, Allen,*** and ***Waldner, supra.***

II. *STATE V. MOHR* CORRECTLY CONSIDERS THE TOTALITY OF CIRCUMSTANCES, RATHER THAN ESTABLISHING A PER SE RULE THAT "HANDS IN POCKETS" CONTRARY TO A POLICE ORDER, ALONE, JUSTIFIES A FRISK.

The state argues that ***Mohr*** should be overruled because it erroneously holds that "a nervous suspect who refuses to comply with police orders to remove his hands from his pockets does not give a police officer reasonable suspicion that the suspect is dangerous." Brief, p. 24.[1]

First, the factual premise of this argument is mistaken. Mohr was not suspected of any crime. He was

[1] This part of the state's argument does not apply to the court of appeals decision in this case, because Mr. Kyles obeyed the officer's order to remove his hands from his pockets.

an mere passenger in a car stopped for a traffic violation. He was asked to step out of the car for a consensual search of the car.

Second, the state appears to be arguing for a *per se* rule that placing one's hands in pockets contrary to a police order, alone, provides a police officer with reasonable suspicion of dangerousness to justify a search.

Not one of the "numerous decisions" cited by the state in support of this argument establishes a *per se* rule that "hands in pockets" establishes reasonable suspicion of dangerousness. The reasonableness of a protective frisk is determined by the totality of the "specific and articulable facts" describing the circumstances of the stop. ***State v. McGill, supra***, ¶ 23; ***State v. Richardson, supra***, 156 Wis. 2d at 139-40.

A blanket exception to the requirement of an individualized suspicion of dangerousness violates basic Fourth Amendment standards, and is without precedent or support. ***See Richards v. Wisconsin***, 520 U.S. 385, 394-395, (1997), overturning this court's blanket exception to the "no knock" requirement of a reasonable suspicion that knocking and announcing would prove dangerous or ineffective.

The state's request that ***Mohr*** be overruled for failing to establish a per se "hands in pockets" rule, therefore, must be denied.

III. UNDER THE TOTALITY OF THE CIRCUMSTANCES OFFICER RIVERA LACKED AN OBJECTIVELY REASONABLE SUSPICION THAT MR. KYLES WAS ARMED AND DANGEROUS.

The reasonableness of a frisk must be determined by the totality of the circumstances, not by any one factor alone. ***McGill, supra***, at ¶ 23.

The state's brief isolates and lists specific facts that have, in other circumstances, been mentioned as *factors* in the totality of the circumstances analysis. The facts of the cases it cites are very different from the facts of this case.

A key factor distinguishing the cases cited by the state is that Mr. Kyles was not suspected of any crime. Mr. Kyles was a mere passenger in a car that was stopped for a minor traffic violation. With no reason to suspect that Mr. Kyles was involved in any crime, there is less reason to suspect that, when approached by officers, Mr. Kyles would be armed or dangerous.

A. "Time of day" and "darkness" are only closely-related factors; under the totality of circumstances in this case, they do not create a reasonable suspicion that Mr. Kyles was armed and dangerous.

"Time of day" and "darkness" are listed as separate factors by the state. They are closely related. As the court explained in ***McGill***: "We have consistently upheld protective frisks that occur in the evening hours, recognizing that at night, an officer's visibility is reduced by darkness and there are fewer people on the street to observe the encounter." ***Id.,*** ¶ 32. As the court pointed out in connection with the after 10 p.m. time in ***McGill,*** the stop occurred "in a dark driveway," and the lone officer had no back-up.

Therefore, under both its "time of day," and "darkness" headings, the state's brief cites ***McGill, supra***. Those factors, however, existed in an entirely different totality of the circumstances context in ***McGill***. In this case, unlike the dark driveway and lone officer, the stop occurred on a "kind of dark" busy street near a well-lighted intersection, and two officers and squad cars were on the scene. The time was 8:45 p.m., an hour in which

moderate traffic could be expected, and not a more inherently suspicious hour for a car to be on a city street.

McGill began with the defendant's attempt to evade the officer, a fact that by itself is so indicative of a guilty mind as to create reasonable suspicion justifying a stop. ***State v. Amos***, 220 Wis. 2d 793, 801, 584 N.W. 2d 170 (Ct. App. 1998). Mr. Kyles, on the other hand, simply had been a passenger in a car in which the driver had neglected to turn his lights on. He was cooperative with police (35:16).

The ***McGill*** factors also included the smell of alcohol and marijuana, and *unusual* nervousness and twitching, none of which are present in this case.

In ***State v. Morgan***, ***supra,*** also cited by the state in its "time of day" argument, the stop occurred at 4:00 a.m. and there was little traffic in the area. Additionally, the stop occurred in a "high-crime-rate area," and the driver's route suggested evasion—in and out of two alleys with several turns in the space of a few city blocks. ***Id.*** at 203-204. Like ***McGill***, ***Morgan*** did not involve a routine traffic stop. When he was stopped, Morgan exhibited more than the usual nervousness. ***Id.*** at 204. The combination of these facts, rather than any one isolated fact, the court held, justified the search.

Again, the totality of circumstances in this case are very different from those in ***Morgan***. The traffic was heavy, there was no erratic driving, the neighborhood was not described as being a high-crime-rate area (*See* Section B., *supra*), and Kyles was not unusually nervous. The 4:00 a.m. time is inherently more suspicious than 8:45 p.m.

Both the time and the facts in ***State v. Williamson***, 113 Wis. 2d 389, 402, 335 N.W. 2d 814 (1983), are greatly dissimilar to the totality of circumstances in this case. In ***Williamson,*** officers spotted two men walking

out of a yard at 2:00 a.m., the men stopped near the squad car and stared at the officers, in response to an officer's questions, Williamson's companion told police that he had been convicted of carrying a gun and that he was currently "wanted." Williamson turned away. Under the totality of the circumstances—the hour, the darkness, the fact that Williamson was with a man convicted of carrying a gun and currently wanted—the court ruled that Williamson's act of turning away so that police could not see his hands raised a reasonable suspicion that Williamson might be carrying a weapon.

Again, in addition to the difference between 8:45 p.m. and 2:00 a.m. circumstances, Kyles and his companion didn't emerge from a yard to stop and stare at police, and there was no evidence that either man had ever carried a gun.

In ***State v. Allen***, 226 Wis. 2d 66, 593 N.W. 2d 504 (Ct. App. 1999), also cited by the state in its "time of day" argument, the stop and frisk took place in a two-block area placed under police surveillance because of numerous complaints "about drug activity, gangs, weapon violations and gunshots." ***Id.*** at 68. An officer observed Allen and a companion make short-term contact with a car "late at night," a contact the officer testified was consistent with drug trafficking. The court held:

> Allen and his companion being in a high-crime area, standing alone, would not be enough to create reasonable suspicion. A brief contact with a car, standing alone, would not be enough to create reasonable suspicion. Hanging around a neighborhood for five to ten minutes, standing alone, would not be enough to create reasonable suspicion. On the other hand, when these three events occur in sequence and are combined with the officers' experience and training, the reputation of

> the area and the time of day, there is enough to create a reasonable suspicion to justify a *Terry* stop.

Id. at 75.

There was no evidence in this case that driving without headlights at 8:45 p.m. was, in light of the police officers' experience and training, suggestive of criminal activity. The officer testified to the contrary—he had no evidence that a criminal act had, or was about to, take place. (35:13-14).[2] And, as will be discussed more fully below, there was no evidence that the stop took place in a high-crime area, let alone an area under police surveillance based on reports of "gangs, weapon violations, and gunshots."

Finally, the state cites ***State v. Williamson***, 58 Wis. 2d 514, 206 N.W. 2d 613 (1973), as taking place at 11:00 p.m. Like ***McGill, Williamson*** began with a driver attempting to avoid police contact by turning frequently when a squad car was behind him, pulling over to the curb until the squad car passed, pulling away from the curb when the squad car was out of sight, then pulling over to the curb again when the squad car came back. This unusual avoidance behavior justified a ***Terry*** stop, the court held. ***Id.,*** at 517-18. The driver was unable to provide a driver's license or identification, and told the officer that the car belonged to a girlfriend. Under those circumstances, the court held, the officer was justified in frisking him for weapons. ***Id.,*** at 519.

Again, unlike ***Williamson***, this case involves no evasive behavior, and no other suggestion of criminal activity.

---

[2] He maintained that driving without headlights was a criminal act, but that was clearly erroneous legal opinion; it is a non-criminal violation punishable, for a first violation, by a $10 forfeiture. Wis. Stat. §§ 347.06, 347.30(1).

Time of day, as it is related to darkness and the number of observers in an area, is a factor in the totality of the circumstances test. But a mere similarity in time of day to a case in which a frisk was found reasonable, without consideration of the totality of circumstances, has no meaning in the constitutional analysis of the reasonableness of the frisk in this case. [3]

B. The frisk did not occur in a "high-crime area."

When asked to describe the area in terms of criminal activity, Officer Rivera replied, "It's pretty active." The state equates that answer to testimony that the frisk occurred in a "high crime" area, and cites ***Morgan***, and ***Allen, supra***.

The officer's "pretty active" reply means nothing in a ***Terry*** frisk analysis, for two reasons

First, "pretty active" is a pretty ambiguous phrase. "Pretty" is defined by Webster's Third New International

---

[3] The ***McGill*** decision suggests a statistical analysis of "time of day," citing an FBI report showing that approximately two-thirds of assaults on officers took place between 6:00 p.m. and 4:00 a.m. ***Id.*** at ¶ 20, citing Federal Bureau of Investigation, Department of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* (1998), 8, 84 (1999). The limitations on statistical analysis, however, are revealed by the same FBI report, showing that only 10.5 percent of the nationally-reported assaults on officers took place during traffic stops, and 82.5 percent of those assaults were accomplished by "personal weapons," meaning hands, fists, feet, etc. (p. 79, 82, 86). That FBI report did not include Wisconsin data. In Wisconsin in 1998, 93.9 percent of the state's reported 475 assaults on officers' involved "personal weapons," and only 8 percent took place during traffic stops. Wisconsin Office of Justice Assistance Statistical Analysis Center, *Crime and Arrests in Wisconsin-1998*, pp. 96, 98 (1999). If the "totality of the circumstances" justifying a frisk for weapons were based on statistics, police would never be justified in frisking a suspect at a traffic stop.

Dictionary (1976) as "in some degree," with "moderately, considerably, tolerably, rather" as examples. Officer Rivera's answer was rendered even more ambiguous by his insistence that operating after dark without headlights was a "crime," thus including minor traffic violations in "criminal activity." (35:14). Presumably, if police stopped a few speeders on the busy street, Officer Rivera would describe the criminal activity in the area as "pretty active."

The trial court did not draw an inference that the area of the stop in this case was a "high crime area," and this court should decline to do so too, for lack of evidence.

Second, "pretty active" does not inform the court whether Officer Rivera perceived himself to be in a high-crime area, thereby increasing the dangerousness of his position. When the court discussed the validity of "high crime" area as a totality of circumstances factor in ***Morgan***, it held, "we find that an *officer's perception* of an area as 'high-crime' can be a factor justifying a search." ***Id.*** at 211. (emphasis added). Similarly, in ***United States v. Michelletti***, 13 F. 3d 838, 844 (5th Cir. 1994)(en banc), *cert denied*, 115 S. Ct. 102 (1994), cited both in ***Morgan*** and in the state's brief, the court noted the officer's "expressed concern that he was patrolling a high crime area of town."

Courts have repeatedly relied upon officer training and experience to inform the weight to be given to specific facts within the totality of circumstances. In ***Allen***, for example, the activity giving rise to police suspicion of criminal activity was a man getting into and out of a car within a minute, then hanging around for five to ten minutes before walking toward a payphone. Based upon officer training and experience about the nature of the neighborhood and the methods of drug trafficking, this otherwise unremarkable activity raised a reasonable suspicion of drug trafficking.

Therefore, when police testify that the facts of the case carry certain inferences because of the nature of the area in which they are observed, as in ***Morgan***, our courts have accepted that as a legitimate factor in the ***Terry*** analysis. In this case, Officer Rivera expressed no concern about being in a high-crime area, and his testimony does not, either specifically or by reasonable inference, indicate that the nature of the area informed the inferences he made from the other facts of the case.

Accordingly, "pretty active," does not equate with "high crime area," and, as the trial court concluded, it is not a specific and articulable fact that provides sufficient information to generate an inference of danger to an officer.

C. Kyles was not unusually nervous.

The overt nervousness which is a legitimate factor in a frisk analysis, is not the usual nervousness a citizen exhibits in the presence of a police officer, but nervousness in excess of normal. In ***McGill,*** cited by the state, the suspect "was unusually nervous—beyond the level of nervousness that the officer normally observed in individuals he stopped." ***Id.*** at ¶ 29.

Similarly, in ***Morgan***, relied upon by ***McGill*** and cited by the state, Morgan was described as "more nervous than the 'usual person stopped by the police.'" ***Id.*** at 215.

The distinction between normal nervousness and unusual nervousness is critical to the ***Terry*** analysis. As the court pointed out in ***McGill,*** police officers are looking for "unusual conduct," suggesting criminal activity, not normal citizen responses to police presence. ***McGill, supra***, at ¶ 21.

In this case, Mr. Kyles "appeared a *little* nervous." (35:6) (emphasis added). When asked if it was common

for people to act nervously during traffic stops, the officer agreed, without indicating that Mr. Kyles was more nervous than a typical person. (35:16).

Normal nervousness in the presence of a police officer, therefore, has not been held to be a factor in the *Terry* analysis. Mr. Kyles being "a little nervous" was not a specific and articulable fact from which a reasonable suspicion of dangerousness could be inferred.

The state speculates that Kyles, as a passenger in a stopped vehicle, had no reason to be nervous about the stop. This is unfounded speculation. Police encounters are inherently stressful. Furthermore, as an African-American, Mr. Kyles was likely to be fearful in a traffic stop situation. ***"The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters,"*** 84 Minn. L. Rev. 265 (1999).

D. Wearing a "big, down, fluffy coat" during a Wisconsin winter does not create an inference of dangerousness.

Wearing weather-appropriate clothing is not a fact contributing to a reasonable suspicion of dangerousness, for the same reason that "normal nervousness" is not a factor--it is not unusual behavior. ***Terry, supra***, as quoted in ***McGill,*** at ¶ 21. Mr. Kyles was wearing a warm coat on December 19, 2001, a day when the temperature ranged between 22° and 34°.[4]

If an officer has drawn a reasonable suspicion of dangerousness, based upon "specific and articulable facts," clothing may then become a factor in affecting whether the suspicion can be mitigated by visually observing the suspect. In this case, Officer Rivera had no specific and articulable facts from which to draw the

[4] This temperature information is from the National Weather Service, and is based on Milwaukee weather.

initial inference that Mr. Kyles was dangerous. Whether his clothing might have mitigated that suspicion, therefore, was not at issue.

Again, the state's brief lists cases in which a "long winter coat" was considered a factor, without placing that factor in the totality of the circumstances of those cases. When the totality is considered, the cases are clearly inapplicable. In ***United States v. Douglas***, 964 F. 2d 738 (8th Cir. 1992), the officer, alone in a dark parking lot, had reason to suspect that the defendant was breaking into cars. The defendant provided an untenable reason for the actions the officer had observed. When asked for identification, he produced an out-of-state driver's license with another person's picture on it. ***Id.*** at 740. In ***United States v. Buchanan***, 878 F. 2d 1065 (8th Cir. 1989), the officers had strong evidence that the defendant was involved in drug trafficking, the defendant's size was large, and the officer was alone. In ***United States v. Hines***, 943 F. 2d 348 (4th Cir. 1991), highly unusual behavior had led to the officer's reasonable suspicion that the defendant was trafficking in illegal substances, he ignored two officer requests to stop, and he deposited a bag he was carrying in a car before turning to face the officers.

In the several cases from other states listed in the state's brief, similarly distinguish factors are present.

In this case, unlike ***Douglas*** and ***Buchanan***, the officer was not alone, and had no suspicion of criminal activity. Unlike ***Hines***, the officer had no reasonable suspicion that he was a sophisticated trafficker in illegal substances. Under the totality of the circumstances, circumstances, ***Douglas, Hines*** and ***Buchanan*** are clearly inapplicable.

E. Placing one's hands in pockets is only a factor; the state cites no cases in which the totality of circumstances was similar to this case.

The state's recitation of facts in this portion of the brief omits the fact that both times Officer Rivera ordered Kyles to take his hands out of his pockets, he complied. (35:15-16). Unlike ***Mohr***, and other cases cited by the state, Mr. Kyles did not defy police orders to remove his hands from his pockets; he simply put them back in his pockets, like a nervous gesture, between the time he got out of the car and when he reached the back of the car. (35:15-16).

Again in this portion of its argument, the state lists cases in which "hands in pockets" was a factor leading to a reasonable suspicion of dangerousness, and Mr. Kyles does not disagree that it is a relevant factor. However, again, the totality of the circumstances of the cases listed in the state's brief is very different from the circumstances of this case.

McGill and ***Williamson, supra***, in which hands in pockets was one of many factors, have been distinguished on their facts.

In ***State v. LeGarde***, 758 So. 2d 279, 282 (La. Ct. App. 2000), the court's statement that the defendant's refusal to remove his hands from his pockets upon request "alone" would have justified a frisk, is made within a totality of a circumstances analysis. Refusal, alone, might justify a frisk under the facts of ***LeGarde***, in which the defendant was encountered "in the private parking lot of a closed business at 3:30 a.m., a location which had been the subject of owner complaints in the past," and he walked away before stopping and refusing to remove his hands from his pockets.

In ***United States v. Harris,*** 313 F. 3d. 1228 (10th Cir. 2002), an officer approached two men who were reportedly smoking narcotics. They first ignored his requests for identification, then, after passing the officer, the defendant "turned around and began walking backwards, facing Officer Allen, with both hands in the front pockets of his jeans." When the officer told him to remove his hands from his pockets, he refused.

In ***Michelletti, supra***, also listed by the state's brief, the officers were in a high crime area at 2:00 a.m., they chased a man who had turned and run behind a tavern when he observed the police, the man and two others were found standing behind the tavern, and then Michelletti emerged noisily from the bar, about ten feet away. The officer testified that Michelletti's cocky demeanor, large size, and the odd placement of Michelletti's right hand in his front pants pocket, drew his attention as out-of-the ordinary. The court found that Micheletti's "alcoholic and deliberate approach, in the context of the suspicious circumstances under which the police encountered the group" constituted a reasonable basis for the frisk. 13 F. 3d at 842.

In ***United States v. Mitchell***, 951 F. 2d 1291, 1293 (D.C. Cir. 1991), the court found that the officer had been called to assist in stopping a car that was apparently fleeing from the police; he observed the passenger moving ""both hands under his coat in a manner suggesting that he was hiding a gun," and when he ordered the passenger out of the car and told him to take his coat off, he observed a bulge he believed was a gun under the man's sweater. ***Id.*** at 1294-96.

In ***United States v. Lane***, 909 F. 2d 895 (6th Cir. 1990), police were called to investigate drug trafficking in an apartment building known for drug trafficking. When they entered, four men in the hallway turned and ran. In chasing them, an officer found himself isolated with one of the fleeing suspects. The officer told him to put his

hands up and face the wall. Lane complied, but then tried to reach his right hand into his left coat pocket. The officer physically put his hand up on the wall again, telling him to leave it there. When Lane again reached for his left coat pocket, the officer frisked. Again, emphasizing the totality of the circumstances, not any one particular factor, the court upheld the frisk based upon reasonable suspicion.

The state lists additional state and federal district court cases in their "hands in pocket," argument. A review of those cases shows many factors not present in this case—high crime neighborhoods, stops of men leaving a known "gang house," at night, suspicion of drug trafficking, overt defiance of a police order to remove a hand from a pocket, and a stopped suspect's sudden reach into an inside pocket after learning he was a suspect in a shootout. Not one of the cases involves a consent search of a mere passenger in a car stopped for a forfeiture traffic violation.[5]

As the trial court found in this case, the totality of circumstances in ***State v. Mohr, supra***, is most like the facts in this case. In both cases, the defendant placed his hands in coat pockets. Both cases are set in a Wisconsin winter—it's cold outside. Mohr refused to take his hands out of his pockets, acting resistive. Mr. Kyles twice putting his hands in his pockets was described by the officer as "like a nervous habit." (35:15). In both cases, in the absence of additional suspicious circumstances, the action did not raise a reasonable inference that the defendant was armed and dangerous.

---

[5] ***Harris v. State,*** 567 A. 2d 476 (Md. Ct. Spec. App. 1990), was reversed on other grounds, 324 Md. 490, 497 A. 2d 956 (1991).

E. Under the totality of circumstances of this case, there was no reasonable suspicion that Mr. Kyles was armed and dangerous.

The uncontradicted testimony in this case is that at 8:45 p.m., on a busy street near a well-lit and busy intersection, the driver of Mr. Kyles' car was stopped for a minor non-criminal traffic violation. Two officers were present, it was "kind of dark," and the two officers found no additional evidence of criminal activity.

The officers obtained the driver's consent to search the car. In order to conduct the search, the police asked the driver and the passenger to step out of the car. The passenger twice nervously on this December evening put his hands in his pockets, but both times complied with the officer's direction to remove them.

The trial court did not infer from these facts that the stop took place in a high crime neighborhood, or that the time and lighting conditions were objective facts supporting a reasonable suspicion of dangerousness. It did not find that Mr. Kyles was unusually nervous, that his coat created a suspicion of dangerousness, or that his putting his hands in his pockets was a furtive gesture. The decision that the facts did *not* create such inferences, is entitled to deference on appeal, just as deference would be paid to such inferences if they were made by the trial court. ***In re Dejmal,*** 9 Wis. 2d 141, 289 N.W.2d 813 (1980).

The trial court's holding that "there's no articulable, objective information here that there was indications that he was in fact dangerous," is solidly supported by the evidence and lack of evidence. The trial court's holding that, instead, Officer Rivera frisked Mr. Kyles for "officer safety" (35:27), indicates an inference that a general concern for "officer safety," not a

reasonable suspicion, based on objective information, that Mr. Kyles was dangerous, was the reason for the search.

Under the totality of the circumstances, therefore, the frisk of Mr. Kyles was not based on reasonable suspicion, and the trial court correctly granted the motion to suppress evidence discovered in the search.

CONCLUSION

For the reasons stated in this brief, Mr. Kyles respectfully requests that this court affirm the court of appeals decision affirming the trial court's exclusion of the evidence seized during the frisk of Mr. Kyles.

He further requests that the court decline the state's invitation to overrule the decision in ***State v. Mohr.***

Dated this 22nd day of September, 2003.

Respectfully submitted,

EILEEN A. HIRSCH
Assistant State Public Defender
State Bar No. 1016386

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566

Attorney for Defendant-Respondent

EAH:vms

CERTIFICATION

I certify that this petition meets the form and length requirements of Rule 809.19(8)(b) and (d) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,976 words.

Dated this 22nd day of September, 2003.

Signed:

EILEEN A. HIRSCH
Assistant State Public Defender
State Bar No. 1016386

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566

Attorney for Defendant-Respondent

STATE OF WISCONSIN

IN SUPREME COURT

No. 02-1540-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JOSHUA O. KYLES,

Defendant-Respondent.

REVIEW OF DECISION OF COURT OF APPEALS THAT AFFIRMED ORDER SUPPRESSING EVIDENCE ENTERED IN CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE DAVID M. BASTIANELLI, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

PEGGY A. LAUTENSCHLAGER
Attorney General

STEPHEN W. KLEINMAIER
Assistant Attorney General
State Bar #1014422

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8908

TABLE OF CONTENTS

CASES CITED

Page

Page

OTHER AUTHORITY

STATE OF WISCONSIN

IN SUPREME COURT

No. 02-1540-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JOSHUA O. KYLES,

Defendant-Respondent.

REVIEW OF DECISION OF COURT OF APPEALS THAT AFFIRMED ORDER SUPPRESSING EVIDENCE ENTERED IN CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE DAVID M. BASTIANELLI, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

ARGUMENT

I. FOR A FRISK TO BE VALID THE OFFICER DOES NOT HAVE TO ACTUALLY FEAR THE PERSON.

The state has argued that a police officer does not have to subjectively fear a person for a frisk of the person[1]

[1]In its original brief, the state used the word "suspect" instead of the word person. *See, e.g.,* Brief of Plaintiff-Appellant-Petitioner at 13. Kyles objects to the use of the word "suspect" because he was

(Footnote continued)

to be valid. Brief of Plaintiff-Appellant-Petitioner at 12-22. The state asked this court to overrule *State v. Mohr*, 2000 WI App 111, 235 Wis. 2d 220, 613 N.W.2d 186, in part, because the *Mohr* court misapplied the objective test for reasonable suspicion by considering the subjective intent of the police officer when it said at 235 Wis. 2d 220, ¶16, that the officer apparently was not concerned about safety because he left the passengers in the car for the first twenty minutes of the traffic stop. The *Mohr* court required the officer to have subjective fear of the person for the frisk to be valid because, in the absence of such fear, the court found the frisk to be unconstitutional.

The trial court in this case believed that *Mohr* required the officer to actually fear the person because the court said the frisk was not warranted under *Mohr*; and the court said it did not even have to look for the officer's intent from an objective analysis because the inquiry ended when the officer said he did not feel threatened (37:5, 7 lines 6-8).

Kyles agrees with the state that the officer does not have to subjectively fear the person for the frisk to be valid. Brief of Defendant-Respondent at 9-10.

Kyles disagrees with the state's interpretation of *Mohr*. Kyles argues that *Mohr* applied an objective test to determine the validity of the frisk and that *Mohr* did not require subjective fear by the officer for the frisk to be valid. Brief of Defendant-Respondent at 6-8.

The state agrees with Kyles that the *Mohr* decision stated the objective test; but the state contends that the *Mohr* decision misapplied the objective test when it found

---

not suspected of committing a crime before the frisk was conducted. Brief of Defendant-Respondent at 5, 12. The use of the word "suspect" is accurate because, by the time Kyles was frisked, the officer had reasonably suspected he was armed. However, the legality of the frisk does not rest on the use of the word suspect or the word person.

the frisk invalid because the court could not understand how an officer, who thought a person was not a threat for the first twenty minutes, could suddenly perceive the threat. *Mohr*, 235 Wis. 2d 220, ¶16. By relying on the lack of the officer's subjective concern of a threat for the first twenty minutes to decide that a frisk was not justified, the *Mohr* decision required the officer to actually fear the person for the frisk to be valid.

The state believes the correct analysis in *Mohr* should have recognized that for the first twenty minutes Mohr did nothing to provide reasonable suspicion that he was armed, but that his refusal to remove his hands from his pockets as ordered by the officer provided reasonable suspicion to justify the frisk because then a reasonably prudent man would have been warranted in the belief that his safety was in danger.

This court does not have to determine whether *Mohr* required subjective fear by the officer for the frisk to be valid. What is important is that this court state that the frisk can be valid even when the officer does not subjectively fear the person frisked.

Kyles argues that the court may consider the officer's perceptions of safety or danger even though subjective fear by the officer is not required. To support his argument, Kyles cites cases that state the court may consider the training and experience of the officer in determining whether probable cause or reasonable suspicion exists. Brief of Defendant-Respondent at 10-12. Citing 2 Wayne R. LaFave, *Search and Seizure*, § 3.2(c), at 40-41 (3d ed. 1996), Kyles states that the officer's training and experience may cut both ways and that, just as an officer may perceive danger based on facts, an officer may also perceive lack of danger. Brief of Defendant-Respondent at 12.

LaFave states the "experience-expertise rule cuts both ways," meaning "that it is also possible that an experienced officer will be held *not* to have had probable

cause because a man with his special skills, though perhaps not a layman, should have recognized that no criminal conduct was involved." LaFave, § 3.2(c), at 40-41. To support his statement, LaFave at § 3.2(c) n.81 cites *Jewell v. Hempleman*, 210 Wis. 265, 266-68, 246 N.W. 441 (1933), wherein the conservation warden thought that the meat on the defendant's property was venison, when in fact it was beef. This court concluded that the jury in the civil suit could have concluded that there had been no reasonable cause to arrest the defendant because the experienced warden had not acted prudently in concluding that the meat was venison. *Jewell*, 210 Wis. at 270.

LaFave and *Jewell* support the proposition that under the objective test there is no probable cause or reasonable suspicion if a trained and experienced officer would recognize that the facts do not satisfy the probable cause or reasonable suspicion standard. LaFave and *Jewell* do not support a proposition that the subjective intent of an officer renders a search or frisk invalid even where the trained and experienced officer would recognize that the facts satisfy the objective test for probable cause or reasonable suspicion. As held in *United States v. Knights*, 534 U.S. 112, 122 (2001), and *Whren v. United States*, 517 U.S. 806, 813 (1996), the subjective intent of the officer does not invalidate conduct that complies with Fourth Amendment standards for probable cause or reasonable suspicion.

Kyles argues that if *Mohr* is overruled, this court will also have to overrule all the decisions that authorize the court to consider the training and experience of the officer. Brief of Defendant-Respondent at 12.

Kyles exaggerates the effect of overruling *Mohr*. An officer's subjective fear of a person differs from the training and experience the officer uses to assess the significance of information when determining probable cause or reasonable suspicion.

An officer's training and experience are background facts used to draw inferences from the historical facts in the application of the objective test for probable cause and reasonable suspicion. *Ornelas v. United States*, 517 U.S. 690, 699-700 (1996). In *State v. Harris*, 256 Wis. 93, 100, 39 N.W.2d 912 (1949), this court considered the officer's experience and special knowledge to be "among the facts which may be considered" when a search warrant is issued. An officer's subjective fear of a person is like the officer's subjective intent that *Whren* and *Knights* said would not invalidate conduct that complied with Fourth Amendment standards. When the facts known to the officer in light of the officer's training and experience satisfy the objective test for probable cause or reasonable suspicion, the officer's subjective intent or lack of subjective fear will not render the conduct invalid. *See, e.g., State v. McGill*, 2000 WI 38, 234 Wis. 2d 560, ¶24, 609 N.W.2d 795 (In examining the record for facts that justified a frisk, the appellate court is not restricted "to the factors the officer testifies to having subjectively weighed in his ultimate decision to conduct the frisk"). Overruling *Mohr's* use of the officer's subjective concerns is consistent with a court using officers' training and experience in the application of the objective test for probable cause or reasonable suspicion.

In this case, even if Officer Rivera did not feel threatened by Kyles, the frisk was valid because the facts known to Rivera satisfied the objective test for a valid frisk.

II. THE TOTALITY OF THE CIRCUMSTANCES KNOWN TO OFFICER RIVERA PROVIDED REASONABLE SUSPICION THAT KYLES WAS ARMED.

In its first brief in this court, the state identified several factors that are appropriate for the court to consider in deciding whether Officer Rivera had

reasonable suspicion that Kyles was armed; and the state cited cases holding that the factors could contribute to the reasonable suspicion. Brief of Plaintiff-Appellant-Petitioner at 25-37.

In his brief, Kyles distinguishes the cases cited by the state from the facts of this case and argues that the cases do not provide precedent for finding that Rivera had reasonable suspicion in this case. Brief of Defendant-Respondent at 13-27. For example, Kyles discusses several cases from the state's brief where the courts cited the defendant's refusal to comply with the officer's order to keep his hands out of his pockets as a reason for finding there was reasonable suspicion that the defendant was armed. Brief of Defendant-Respondent at 23-25. Kyles argues that some of the cases had additional factors to help provide reasonable suspicion that are not present in this case, and he contends that "[n]ot one of the cases involves a consent search of a mere passenger in a car stopped for a forfeiture traffic violation." Brief of Defendant-Respondent at 25.

The state never argued that the cases it cited were direct precedent for the proposition that the circumstances in this case provided reasonable suspicion. The cases were cited to show that the individual factors were proper to consider in evaluating the circumstances.

In determining whether circumstances provide reasonable suspicion or probable cause, other cases are seldom close enough on their facts to provide controlling precedent. *Ornelas*, 517 U.S. at 698; *State v. Young,* 212 Wis. 2d 417, 432, 569 N.W.2d 84 (Ct. App. 1997). Therefore, it should not be surprising that the state did not cite a case involving a consent search of a passenger in a car stopped for a forfeiture traffic violation. The frisk in this case should not be found to be invalid just because there is no direct precedent for its validity. This court must decide whether the totality of the circumstances present in this case provided reasonable suspicion that Kyles was armed. *United States v. Arvizu*, 534 U.S. 266,

274 (2002); *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). As argued in its first brief, the state submits that the circumstances provided the necessary reasonable suspicion. Brief of Plaintiff-Appellant-Petitioner at 36-37.

As the state argued in its first brief in this court, the most significant factors providing the reasonable suspicion that Kyles was armed were that he repeatedly put his hands into the pockets of his fluffy coat that could conceal a weapon even though Officer Rivera twice told him to keep his hands out of the pockets (35:15-16). Brief of Plaintiff-Appellant-Petitioner at 37. In trying to distinguish the cases the state cited, Kyles argues that the cases include many other factors in addition to the coat and the failure to comply with police orders. Brief of Defendant-Respondent at 21-25.

Several of the cases cited by the state provide precedent for finding a frisk is justified when the only factors are that a person fails to comply with police orders to keep his hands out of a pocket that could conceal a weapon. *State v. LaGarde*, 758 So.2d 279, 282 (La. Ct. App. 2000) (defendant's refusal to remove his hands from his pockets upon request "alone would have justified conducting a frisk for weapons"); *State v. Stewart*, 721 So.2d 925, 927 (La. Ct. App. 1998) (noting that other facts reinforced the officer's decision to conduct a frisk, the court said the frisk was justified when the defendant refused to comply with the officer's repeated requests that he place his hands on the police unit); *Harris v. State*, 567 A.2d 476 (Md. Ct. Spec. App. 1990), *reversed on other grounds*, 597 A.2d 956 (Md. Ct. App. 1991) (the only reason cited for the court's conclusion that the frisk was justified was that the defendant kept putting his hand up by his breast pocket despite the fact that he had been ordered to keep his hands on the trunk of the car); *People v. Laube*, 397 N.W.2d 325, 329 (Mich. Ct. App. 1986) (frisk was justified because during consensual encounter the defendant repeatedly placed his hands in his pockets while inching toward the rear of the patrol car after the

officers asked him to keep his hands out of his pockets); *People v. Robinson*, 718 N.Y.S.2d 524, 525 (N.Y. App. Div. 2000) ("In light of the repeated movements of defendant toward that pocket despite the officer's requests that he remove his hand from is pocket," the frisk was justified); and *People v. Pettis*, 600 N.Y.S.2d 713, 714 (N.Y. App. Div. 1993) (court found frisk was justified when the defendant put his hand inside his jacket pocket and refused to remove it when requested).

The frisk of a person who was the passenger in a car stopped for a traffic violation was upheld in *United States v. Mitchell*, 951 F.2d 1291 (D.C. Cir. 1991), because the passenger's hand movements gave the police reasonable suspicion that he was armed.

In two other cases, the court approved the frisks that were conducted during consensual encounters. *People v. Frank V.*, 233 Cal. App. 3d 1232, 285 Cal. Rptr. 16, 18-21 (1991), and *Laube*, 397 N.W.2d at 329.

The above cases provide precedent for a valid frisk of someone who is not suspected of having committed a crime. A stop is not required before the frisk because the frisk can occur during a consensual encounter. A frisk can be found valid based on the person's failure to comply with a police command to remove his hands from his pockets or to keep his hands away from his pockets. Those circumstances came together in this case to provide Officer Rivera with reasonable suspicion that Kyles was armed so that the frisk was justified.

Kyles claims that the state is "arguing for a *per se* rule that placing one's hands in pockets contrary to a police order, alone, provides a police officer with reasonable suspicion of dangerousness to justify a search." Brief of Defendant-Respondent at 13.

The state is not asking for a *per se* rule. A *per se* rule was approved in *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997), where the Court held that an officer

making a traffic stop may order passengers to get out of the car pending completion of the stop even though the passengers have not provided any reason for ordering them out. The *per se* rule was approved because of problems that may arise during traffic stops. *Id.* at 413-14.

In this case, the state is asking the court to recognize that the requirement for specific and articulable facts providing reasonable suspicion in the particular case is satisfied when a person fails to comply with a police order to keep his hands out of pockets that could be concealing a weapon. The cases cited in this brief and at pages 31-36 of the Brief of Plaintiff-Appellant-Petitioner supply precedent for this court to hold police have reasonable suspicion that a person is dangerous under such circumstances.

In this brief and at pages 31-36 of the Brief of Plaintiff-Appellant-Petitioner, the state has cited numerous cases where the courts held that a frisk was justified because the person had failed to comply with a police order to keep his hands out of pockets that could be concealing a weapon. Kyles has cited no case other than *Mohr* where a court found that the frisk was invalid when it was made after the person failed to remove his hands from his pockets in compliance with a police order. The weight of authority supports the state's position.

Even without the benefit of precedent, the circumstances in this case provided Rivera with reasonable suspicion that Kyles was armed. One reason given by the Supreme Court for the *per se* rule in *Wilson* is the possibility of a violent encounter stemming from the fact that evidence of a more serious crime than the traffic stop might be uncovered during the stop. *Wilson*, 519 U.S. at 414. In this case, Kyles was removed from the car so it could be searched. In light of the concerns for violence expressed in *Wilson*, Rivera had reasonable suspicion that Kyles was armed when Kyles failed to

comply with Rivera's orders to keep his hands out of his pockets.

Kyles claimed that he complied with police orders because both times the officer told him to take his hands out of his pockets he did so. Brief of Defendant-Respondent at 23.

Kyles did not "comply" with police orders. To comply with the police order, Kyles should have kept his hands out of his pockets after being told one time. When Kyles failed to obey Rivera's first order to keep his hands out of his pockets, Kyles provided Rivera with reasonable suspicion that he (Kyles) was armed.

Kyles argues that the trial court found that there was no articulable, objective information that Kyles was dangerous (35:26-27; Pet-Ap. 111-12). Brief of Defendant-Respondent at 3, 8-9, 26.

Kyles's interpretation of the trial court findings should be rejected. The court found there was no indication Kyles was dangerous only after the court said *Mohr* required that result (35:26-27; Pet-Ap. 111-12). The court said it would approve the frisk but *Mohr* required a different result (35:26-28; Pet-Ap. 111-13).

This court should agree with the trial court that Kyles' actions gave Rivera reason to believe that Kyles had a weapon (35:26, 28; Pet-Ap. 111, 113).

CONCLUSION

The state submits that the state's brief-in-chief and reply brief refute all claims made by Kyles.

For the reasons discussed above and in its original brief, the State of Wisconsin requests this court to reverse the decision of the court of appeals and to reverse the trial court's order granting the suppression motion. Upon

reversal of the suppression order, the case should be remanded for further proceedings. The state also asks this court to overrule *State v. Mohr*.

Dated this 6th day of October, 2003.

PEGGY A. LAUTENSCHLAGER
Attorney General

Stephen W. Kleinmaier

STEPHEN W. KLEINMAIER
Assistant Attorney General
State Bar #1014422

Attorneys for Plaintiff-
Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8908

CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 2,999 words.

Stephen W. Kleinmaier
STEPHEN W. KLEINMAIER